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Law and the Social Sciences

By
HUNTINGTON CAIRNS

FOREWORD BY
ROSCOE POUND

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PREFACE

MAITLAND has somewhere remarked upon the traditional isolation of law from every other study ; this tradition has happily within recent years been brought to an end. It is recognized that the distinctions of the analytical jurists did much to clarify legal thinking, but we have learned that their utility is limited and that the law, if it is to satisfy social needs, must draw also from other sources. To-day there is a persistent demand for the co-ordination of jurisprudence with the social sciences, but definite suggestions as to how this task is to be accomplished have been few. I had hoped, when I first undertook to study the problem, that I might determine at least some of its many aspects. Now I am gratified if I have done no more than state them.

The limits of a study of this type must of necessity be arbitrary. Each chapter could well be expanded into a separate volume, and the discussion of most points would no doubt gain by lengthier treatment. I have chosen, however, to explore the subject within what has seemed to me its essential limits.

Each chapter has been read by one or more specialists in this or in other countries ; without their help my work would have been even more imperfect than I am sensible that it is. To my friends, for help of a more general character, the book owes a real debt. I have to thank the Editors of the *Columbia Law Review* for permission to reprint material which has appeared in its pages.

Baltimore,

H.C.

July 25th, 1934.

FOREWORD

By ROSCOE POUND

IN the last century, as the culmination of a development which began in the sixteenth century, jurisprudence had come to be set off as a separate science. Until the Reformation, what we now call the social sciences were in effect merged in theology and differentiated only as applications. The thirteenth century put philosophy behind theology, and so behind law, to sustain its authority, and in the seventeenth and eighteenth centuries philosophy had come to take the place of theology. The Protestant jurist-theologians in the sixteenth century sought to divorce jurisprudence from theology and this divorce was substantially achieved in the next century, although an alternative theological basis was perfunctorily asserted, along with the basis in philosophy, down to relatively recent times. For two centuries jurisprudence, politics, and international law were treated together. There was a common philosophical foundation and the details were reached by deduction therefrom. The nineteenth century carried the differentiation still further. It divorced legal philosophy from political philosophy, thus separating law from politics, and set off jurisprudence as a distinct science. Finally, the English analytical jurists sought to set off jurisprudence from philosophy and from ethics, and so from the science of legislation. So far was this carried that at the end of the nineteenth century it could be asserted that the jurist had nothing to

do with problems of improving the law. Such things belonged to the student of legislation.

It is not hard to understand what lay behind this extreme narrowing of the field of jurisprudence. The analytical jurists were quite right in seeing a significant difference between the undifferentiated or scarcely differentiated social control of a primitive society, or even so advanced a society as a Greek city-state, and the highly specialized form of social control through the legal order as the paramount agency thereof in the modern state. It is true the anthropologist can see the beginnings of differentiation a long way back. But the turning point, as the jurist sees it, is the secularization of law, when the authoritative bases of adjudication and of predicting official action become a tradition of a class of professional lawyers. What Austin calls "developed law" or "matured law" was a significant subject of analysis in an era of organizing and systematizing juristic activity in the last century.

A counter movement began in the latter half of the century. Austin's analysis, avowedly made only for a developed legal order, was unsatisfying to the historical jurists, who have had a tendency to identify all social control with law. It is rejected by the realists who use law to include all official action. At the beginning of the present century the neo-Hegelians sought to bring law and economics into relation through philosophy. Later sociological jurists sought to unify the social sciences. And to-day social philosophies, of which philosophy of law is to be but a phase, are widely urged and adhered to. There is even a revival of the relation of jurisprudence and ethics. Where the seventeenth and eighteenth centuries sought to merge the one in the other, the

nineteenth century set them off and contrasted them. To-day more than one social philosophy would subordinate the science of law to a science of morals from which the former is to get the answer to its fundamental quest for a measure of values.

Indeed there is a real task of unification within the science of law. The term "law" has at least three meanings ; that is, at least three subjects are to be considered in a branch of learning which would treat of all that we call "law". In what is the oldest and longest continued use of the term it means the whole body of legal precepts which obtains in a given politically organized society. In a wider phase of this sense it may be said to mean the body of authoritative grounds of or guides to judicial and administrative action established or recognized in such a society, including precepts, technique, and received ideals. In a second sense it is used to mean the legal order ; the régime of ordering human activities and adjusting human relations through the systematic application of the force of politically organized society. But this legal order is a specialized form of social control. Hence one might speak of a régime of ordering conduct through social pressure backed by the force of the political organization of a society. A third meaning refers to what Mr Justice Cardozo has happily termed the "judicial process", to which we must now add the administrative process. Indeed, in the classical Roman legal polity one might have added the juristic process.

Each of these meanings has something significant for an effective science of jurisprudence. If we seek to unify them, we must do so through a unification of the social sciences, perhaps, as men now think, by an idea of

civilization, towards the maintenance and furtherance of which they are instruments, or an idea of social control as a phenomenon of civilization.

Thus all the sciences which have to do with social control in any of its aspects have their bearing on jurisprudence. If we differentiate them, as St Thomas Aquinas did not, yet we do not hold these differentiated branches of learning exclusive and self-sufficient, as did the jurists of the last century, but so far agree with the mediaeval jurist-theologian that we seek a common basis, even if not the one in which he believed.

It is evident, then, that a discussion of the relation of the several social sciences to law, in any of the meanings of that term, is timely and significant. It is especially significant for jurisprudence as indicating the line of synthesis of the subjects, competing for the name "law", of which we must treat, even as we must distinguish them, in the science of law as men understand it to-day.

Mr Cairns has done a service to the science of law by his discriminating survey.

LAW AND THE SOCIAL SCIENCES

CHAPTER I

INTRODUCTION

No aspect of present legal thinking is more marked than its tendency to levy upon all fields of knowledge for assistance in the analysis of fundamental problems. Our legal scholars to-day are as apt to point their discussions with citations from the facts of biologic chemistry as from Supreme Court cases. This characteristic results perhaps from the departure from the view that law was entirely self-sufficient—that a science of law could be framed on the basis of law itself—to an emphasis upon purpose and function. But it is a characteristic which is not peculiar to legal thinking alone; it is part of the recognized trend in all departments of knowledge—the trend away from the insularity which was formerly the hall-mark of their practice to the perception of their ultimate inter-dependence. “All the sciences”, even Descartes¹ declared, “are so interconnected, that it is much easier to study them all together than to isolate one from all the others.” To-day it is by its comprehensiveness, by its adequate adjustment to all the circumstances of its environment, that such a field of human activity as the law is now tested.

¹ Rules for the Direction of the Mind, 1 *Philosophical Works of Descartes* (1911), 2.

Prior to the nineteenth century, the social sciences, with which, of all fields of knowledge, the law has its closest relations, had not become specialized departments of knowledge dedicated to the investigation of the social implications of their individual domains. In Greek thought at the time of Plato, the subject matter of philosophy—the “universal science”—was held to embrace almost the entire field of knowledge; one of the most interesting figures of Greek philosophy to us to-day is, indeed, Hippias of Elis, whose kaleidoscopic genius, as Gomperz¹ tells us, was applied to all the arts in turn. He was astronomer, geometer, poet, arithmetician, diplomat; he discussed the theories of sculpture and painting, and he wrote on phonetics, rhythm and music; he was at once mythologist and ethnologist, and a student of chronology and mnemonics; he also mastered most of the industrial arts. Once he appeared at the Olympic gatherings in garments every part of which had been manufactured by his own hands. But the rareness of the ambition and ability to master every kind of employment is reflected in the general tendency of scholars to insist upon narrowing the scope of a subject as knowledge of the field increases and becomes more detailed and complex. Thus, beginning with the Renaissance, we have witnessed the gradual mapping, between ever narrower boundaries, of the different areas of the world of thought. The social sciences represent the last grand sub-division. If we are searching for a date, economics, political science and the other disciplines may be said to be definitely launched as social studies with the humiliating discovery of Buffon²

¹ *1 Greek Thinkers* (1920), 431

² *1 Oeuvres complètes de Buffon* (1853), 6.

that "Man himself must be placed in the class of animals" and with Montesquieu's¹ belief in the possibilities of a science of mankind: "I have first of all considered mankind; and the results of my thoughts have been, that amidst such an infinite diversity of laws and manners, they are not solely conducted by the caprice of fancy." For the last two hundred years the effort has been made in the realm of the social sciences to duplicate in the statement of social laws the tremendous success of the natural sciences in formulating the laws of nature.

The inevitable movement of the social sciences, as they progressed, was in the direction of specialization, although their fundamental unity was perhaps always fully understood, at least by the great geniuses—Wundt, Tylor and others—who contributed so materially to their development. But recently the attention of social scientists has been directed especially to the study of the interrelations of the various social sciences with the hope that it would lead to the germination of new ideas and an increased perspective. This new movement has also been felt in the law. There has been a definite tendency on the part of legal scholars to look to the social sciences for guidance and assistance at the points at which these studies and law overlap. It has been strongly felt that the problems confronting jurisprudence cannot be solved by legal materials alone. Thus we find the present day legal scholars, particularly the younger generation, turning with increasing frequency to the social sciences for aid. This tendency has manifested itself in the frequent citation of material from the social sciences. Occasionally such citations appear

¹ *The Spirit of Laws* (Nugent's trans 1900), xxxi.

in the opinions of judges, notably in the dissenting opinions of Mr Justice Brandeis.

Notwithstanding this marked tendency, and in spite of a real need, there has been no concerted effort to examine systematically and precisely the interrelations of law and the various social sciences. To this task the present effort is directed.

Similar efforts in the past in other fields have revealed that such a method of approach must be handled with the utmost caution. It leads too often to facile generalizations which have no scientific validity and to analogies which retard rather than advance the development of thought. Biology, for example, has been levied upon by political scientists for numerous analogies and concepts and the foremost generalization born of the synthesis of these departments was the idea that the state was an organism. In the hands of Spencer¹ this metaphor received its most complete expression, and the analogies he drew, such as nerves paralleling arteries as telegraph wires parallel railroad tracks, were numerous and bizarre. Nevertheless, for all the thought which has been lavished upon it, the metaphor has contributed nothing to our knowledge of the nature of the state but instead has led thinkers to false conceptions which have vitiated large portions of their work. Social scientists are apt to find in related fields resemblances which interpret without clarifying and methods which appear to work swiftly but only, we find, as a substitute for thought. Thus psychoanalysis, one of the most valuable instruments of psychological research yet devised, in the hands of skilful biographers and historians has revealed new depths of personality in such difficult figures, for instance,

¹ 1 *Principles of Sociology* (1879), Part II, *Principles of Ethics* (1879), Part IV.

as Luther and Leonardo da Vinci,¹ but its uncritical use by psychologists has produced sonorous and flexible explanations of social phenomena, which, if examined, are meaningless. When there are discoveries in one field of science, an effort is at once made to apply these discoveries to other fields without inquiring in what manner the application will lead to fruitful ends or wherein lies their real applicability. Evolution after 1859 became the shibboleth by which practically all problems were resolved; to-day the concepts of the new physics, although of the greatest importance to scientists in every field, likewise are the subject of much unsound thinking. Subjects, however, such as sociology and history, anthropology and religion, political science and law, so often meet on common ground that their synthesis along certain lines is natural and valuable.

Here we are concerned with only five subjects—anthropology, economics, sociology, political science and psychology. These subjects, among the large number which to-day are known as social sciences, appear to offer the most fruitful possibilities by way of synthesis. Social psychology and geography will be omitted because apparently they have not reached a stage at which they have many material contributions to offer. Penology will also be omitted, as the subject matter of this field has been thoroughly canvassed. It will be best also to avoid all discussion of method,² at least where

¹ Preserved Smith, *Luther's Development in the Light of Psychoanalysis* (1913). 24 *Am Jr Psych*, 360, Freud, *Leonardo da Vinci* (1916).

² On method generally, and in the law, there is little to add to what Professor Cohen has said. See *Reason and Nature* (1931), *Law and the Social Order* (1933), *Logic and Scientific Method* (1934). See also Cook, *Scientific Method and the Law* (1927). 13 *A. B. A. Jr.*, 303, Yntema, *The Rational Basis of Legal Science* (1931). 31 *Col L. R.*, 925, *Idem.*, *Legal Science and Reform* (1934). 34 *Col. L. R.*, 207.

it is not absolutely required. It is a subject to which seemingly there is no end and, as the eminent Poincaré pointed out, while the physical scientists devote their time to solving their problems, the social scientists devote theirs to discussing their methods. So far as possible, the emphasis will be upon the immediate contributions which the social sciences can make to legal thinking.

CHAPTER II

ANTHROPOLOGY

CULTURAL anthropology was born in the latter half of the nineteenth century and to a few jurists of that time it was at once clear that a profitable field of research for the law had been opened. Sir Henry Maine in England,¹ and A. H. Post² and Josef Kohler³ in Germany were the leaders in explorations into this new territory. Post and Kohler in particular were indefatigable workers in the field of anthropology and even to-day an essay such as Kohler's *Zur Urgeschichte der Ehe*⁴ possesses considerable anthropological importance. Maine, it must be remembered, published his *Ancient Law* in 1861 when there were only a few anthropological works in print which could be of assistance to him, and he seems at that time to have been unaware even of such works as Morgan's *League of the Ho-de-no-san-nee*.⁵ Thus it is greatly to his credit that he should have turned for light upon juridical problems to early systems of law before the fever for anthropological research had really set in. But after the movement was under way he did not keep

¹ *Ancient Law* (1864), *Lectures on the Early History of Institutions* (1875), *Village Communities in the East and West* (1871), *Dissertations on Early Law and Custom* (1883).

² *Die Geschlechtsgemeinschaft der Urzeit und die Entstehung der Ehe* (1875), *Der Ursprung des Rechts* (1876), *Die Anfänge des Staats- und Rechtslebens* (1878), *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis* (1880-1), *Die Grundlagen des Rechts* (1884), *Afrikanische Jurisprudenz* (1887), *Studien zur Entwicklungsgeschichte des Familienrechts* (1890).

³ *Zeitschrift für vergleichende Rechtswissenschaft, passim*

⁴ *Ibid* (1897), XII, 187-353.

⁵ (1851).

pace with it; the torch passed into the hands of Post and Kohler and the other writers whose chief medium of expression was the *Zeitschrift für vergleichende Rechtswissenschaft*. Moreover, J. F. McLennan,¹ a Scottish lawyer and a keen student of anthropology, soon placed his finger on Maine's weakest point—in view of our present knowledge—his patriarchal theory. Nor were Post and Kohler exempt from mistakes, which arose chiefly from the dearth of anthropological knowledge at that time. But what is more important than the errors of these early workers is the fact that the field of inquiry which they uncovered soon ceased to attract the attention of either jurists or anthropologists.²

For more than a quarter of a century research in anthropological jurisprudence, save for a few scattered and unrelated inquiries, has been at a standstill. In 1915 Professors Kocourek and Wigmore drew attention to the importance of the field by reprinting in their *Evolution of Law* some of the significant early writings. To-day a recrudescence of interest in this field for the sociologist and the anthropologist—if not for the lawyer—appears to be taking place.³ In a slim but admirable

¹ *The Patriarchal Theory* (1885), passim, cf. 1 Spencer, *Principles of Sociology*, Part III, Chapter IX.

² Pound thus well summarizes the achievements in this field "These interpretations have done something for the science of law as it is to-day. They have led us to a wider basis for philosophy of law. They have introduced thorough study of primitive social and legal institutions and thus have exploded many traditional false ideas that had come down from the days of the state-of-nature theory. They have given added impetus to the movement for unification of the social sciences by establishing connections with ethnology and anthropology and social psychology. Most of all they have suggested lines of preparatory work that must be carried on before we may achieve an adequate social theory and hence an adequate theory of law as a social phenomenon." *Interpretations of Legal History* (1923), 91.

³ Cf. Frank, *An Institutional Analysis of the Law* (1924). 24 *Col. L. Rev.*, 480; Dickinson, *Social Order and Political Authority* (1929). 23 *Am. Pol. Sci. Rev.*, 293, 393; Cantor, *Law and the Social Sciences* (1930). 16 *A. B. A. Jr.*, 385. The revival has reached even to the Supreme Court, which, in an opinion

volume Malinowski¹ has indicated the importance of primitive law for the anthropologist, and Lowie has similarly attempted in two brilliant papers² to attract the attention of the lawyer. Primitive law ceased to interest anthropologists, Malinowski has pointed out, because they had an exaggerated idea of its perfection; it also ceased to attract attention because—and mistakenly, as Malinowski has likewise shown—it was apparently easily explained.³ Recent legal thinkers have neglected the study of the relationship of law and anthropology because in the hands of their nineteenth century predecessors it led to sterile conceptions and a false philosophy of law; the study has also been neglected because of the constant disinclination of jurists until recently to seek help in adjoining fields. Law has been regarded as a subject which contains within itself the seeds of its own growth; but with the movement towards synthesis and the development of a functional attitude in jurisprudence and in anthropology it may well be that these departments by again combining will contribute to each other's advancement.

To-day in both jurisprudence and anthropology there has developed what is termed the functional attitude. This attitude, for jurisprudence at any rate,

by Mr Justice Brewer, has officially declared itself, on the burning question of patriarchy versus matriarchy, in favour of the patriarchy as the earliest form of society. "History discloses the fact", the Justice writes, "that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present" *Muller v. Oregon*, 208 U.S. 412 (1908).

¹ *Crime and Custom in Savage Society* (1926).

² Anthropology and Law, in *The Social Sciences* (1927), 50, *Incorporated Property in Primitive Society* (1928). 37 *Yale L. J.*, 551.

³ Malinowski, *op cit.* *supra* note 1, at 5.

is closely related in contemporary thought to the instrumentalist or pragmatist movement. In jurisprudence it means simply that the jurist takes account, in Pound's phrase, of law in action as well as of law in books. No longer does the jurist regard law solely as a self-contained system of thought, comparable to mathematics or logic, which can be developed on paper from a few premises to meet all exigencies, as Whitehead and Russell in *Principia Mathematica*¹ developed symbolic logic. In the past the jurist has been content to frame his rules and test them by abstract principles of justice without concerning himself with the test of their applicability. Frequently the rules were unenforceable, absurd, and in practice unjust. From the functional point of view the attempt to frame legal precepts with respect to social interests and needs is more important than their logical or historical coherence on paper. The functional movement has given great vitality to legal thinking and has raised law to the status of a social science.² In anthropology, Malinowski, who is responsible for the label "functional" in this field, has best stated the aims and principles of the functional method: "This type of theory", he writes, "aims at the explanation of anthropological facts at all levels of development by their function, by the part which they play within the integral part of culture, by the manner in which they are related to each other within the system, and by the way in which this system is related to the physical surroundings. It aims at the understanding of the nature of culture, rather than at conjectural reconstructions

¹ (1912-13)

² Cf. Pound, Art. Jurisprudence, in *The History and Prospects of the Social Sciences* (1925), 463-4 and the same author's *Law in Books and Law in Action* (1910). 44 *Am. L. Rev.*, 12.

of its evolution or of past historical events.”¹ Culture from the functional standpoint is regarded not only as dynamic but as an organic whole. Modern anthropology endeavours to study exogamy, totemism and other manifestations of primitive culture not solely with regard to the narrow field which these phases occupy but also in relation to the entire field of social organization. Primitive culture is examined in action, and preconceived assumptions and paper schemes are banished. To-day law and anthropology are in their programme one.

In marking out the boundaries of a new subject we are at once perplexed by the multitude of problems which arise. So many questions press for an answer, so many lines of inquiry appear fruitful, that the risk of wandering is great. This risk is no less real even when we are dealing with a subject, such as the relationship of law and anthropology, whose development must proceed along restricted lines. Anthropology, for all the achievements to its credit, has in the hierarchy of thought only recently cast aside its swaddling clothes and at present it is impossible to discern its ultimate contribution. The simplest criterion by which to mark the present limits of the subject appears to be: What discoveries and conclusions of the anthropologist are of value to the jurist? With the assistance of this criterion three lines of contact suggest themselves:

- (a) The nature of law;
- (b) Legal history and anthropology;
- (c) Law and anthropology in action.

¹ Art. Social Anthropology in *Encyclopædia Britannica* (14th ed. 1929), Cf. his article, Parenthood—The Basis of Social Structure in *The New Generation* (1930).

(a) The Nature of Law

In attempting to arrive at an understanding of the nature of law we may first consider what is meant by the term "law" and whether "law" exists in primitive cultures in the sense that it is supposed to exist in advanced cultures. Jurists from the Ancient Greeks to the present day have found it a notoriously difficult task to define the term "law" and there exists no definition which is satisfactory to all inquirers. Conceptions of the nature of the state have determined the view of law that jurists have taken and as these conceptions have changed from time to time the definitions have been modified to meet current theories. The sociological theory of the nature of the state, advanced by Small,¹ MacIver,² Oppenheimer³ and others is to-day one of the corner-stones of modern political theory. No longer is political science under bondage to the lawyers, as Beard⁴ once complained, and definitions of law in terms of supreme authority have been generally abandoned. The state, from the sociological standpoint, is viewed as a specific association, a product of social growth and "perhaps the most important of several fundamental types of organs or agencies utilized by society to insure that collective life shall be more safe, efficient and progressive."⁵ Mr Justice Cardozo, in accord with general sociological thought, has advanced what may be termed a sociological, or functional, definition of law. "A principle or rule of conduct so established as to justify a prediction with reasonable

¹ *General Sociology* (1905).

² *Community. A Sociological Study* (1924), *The Modern State* (1926).

³ *The State* (1914).

⁴ *13 New Republic* (Nov. 17, 1917), Supp. 3.

⁵ *Barnes, Sociology and Political Theory* (1924), 43.

certainly that it will be enforced by the courts if its authority is challenged, is ", he holds, " a principle or rule of law."¹ This statement is, of course, not strictly a definition of law. But it suggests a real criterion, as will presently be seen, by which to recognize law in advanced cultures.

It can be laid down, as a beginning, that principles or rules of conduct obtain in both primitive and advanced cultures. In all cultures we are confronted with the task of distinguishing rules of law from other rules of conduct, such for example, as the rules of conduct regulating the behaviour of communicants of the Roman Catholic Church or the rule that a man shall pay a debt incurred at cards. By Cardozo's criterion we are able to distinguish rules of law from other rules of conduct : rules of law are those rules of conduct which we are able to predict will be enforced by the courts. All other rules of conduct in legal theory are simply rules of conduct and nothing more. It is thus apparent that the essential element of the criterion is the element represented by the idea of " a court ". Without this element Cardozo's criterion would be of no value, as it would not enable us to distinguish law from other rules of conduct. There is implied in this definition, it is necessary to add, the concept of the state, or, by its criterion, the decrees of the Rota would be law. Within the closed system of the Catholic hierarchy the decrees of the Rota may well be law ; but they are not law in the

¹ *The Growth of the Law* (1924), 52 Cf. 44. This conception of law was first put forward by Holmes *Collected Legal Papers* (1920), 173. For a similar definition of John C. H. Wu, *Juridical Essays and Studies* (1928), 108. Dr Wu adds, " Psychologically, law is a science of prediction par excellence." Cf. Meyerson, *Identity and Reality* (1930), 25 " Science, we have just seen, has an end, prevision. Its domain will thus include all that is capable of being foreseen, all of the facts subject to rules. Where there is no law, there is no science."

sense in which we are considering it and it is the addition of the element of the state as the authority creating courts which excludes them. For advanced cultures Cardozo's definition is sufficient: we are able, by the criterion it postulates, to distinguish law from other rules of conduct.

When we attempt to apply this definition in certain primitive communities we discover that it will not work. In many primitive communities throughout the world we find no courts and no agencies for the administration of justice in any way comparable to courts. Justice in a case of violation of criminal rules of conduct is a private matter; redress is obtained by the individual affected, either unaided or with the assistance of his friends or kinsmen. Punishment may take a form similar to the injury, or the offender may be killed or beaten, or the crime may be absolved by the payment of a fine.¹ This form of administration of justice is so widespread that two examples will suffice. Among the natives of Eddystone Island strict monogamy prevails, and lapses on the part of the man, contrary to the custom in more civilized parts of the world, are regarded with an opprobrium equal to that with which lapses on the part of the woman are regarded. During a visit of Rivers to the Island, a wife discovered that her husband had been guilty of adultery. At once she put a knife into him, inflicting a severe but not a fatal wound. This procedure was regarded as orthodox and natural.² Again, the penalty for incest among these natives is death and, the event occurring, any machinery for the determination of guilt or punishment is held to be unnecessary. As

¹ Hobhouse, Wheeler and Ginsberg: *The Material Culture and Social Institutions of the Simpler Peoples* (1913), 50 et seq.; Rivers, *Social Organization* (1924), 159 et seq., Malinowski, *op. cit.* supra p. 9, note 1, *passim*.

² Rivers, *ibid.*, 168-9.

soon as the crime is discovered the punishment follows automatically and the kinsmen of the offender take the leading part in its infliction.¹ In the field of primitive civil law, which Malinowski has been the first to discuss adequately, we also find Cardozo's definition to be of little assistance.² There exists in the Melanesian community inhabiting the Trobriand Archipelago a system of exchange whereby the villagers on the edge of the lagoon barter their catches of fish for vegetables from inland communities. This system, primarily economic, is conducted with great ceremony. In addition, as Malinowski has been able to show, a definite legal element enters into the arrangement. Fishermen must promptly and in full repay inland traders for the vegetables they receive, and so must the traders pay the fishermen. The dependence of the two communities upon each other for the exchange of food gives to each the weapon for the enforcement of the contract—reciprocity; although, as in civilized communities, the natives attempt, when there is no danger of loss of prestige, to evade their obligations. This system of mutualities, illustrated by the exchange of fish for vegetables, is an integral part of the Melanesian social organization. But it is the ceremonial manner in which certain of these transactions are carried out, and the feeling that the rules of conduct regulating the transactions are binding, that differentiate law in Melanesia from the remaining body of custom. Malinowski, upon these facts has framed an anthropological definition of law: "Civil law, the positive law governing all the

¹ Rivers, *Social Organization* (1924), 168-9

² Although published as late as 1924 E. Sidney Hartland's *Primitive Law*, while in many respects a valuable work, is based to a considerable degree upon older anthropological concepts.

phases of tribal life, consists . . . of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of a reciprocity and publicity inherent in the structure of their society."¹

A few anthropologists have turned their attention to the problem since the appearance of Malinowski's essay. In a highly competent study of the Orokaiva, who occupy the major part of the Northern Division of Papua, Williams² concludes, after pointing out that there are virtually no guardians of the law, that the sanctions of Orokaiva morality are something less solid than legal authority. He believes that the sanctions which govern ordinary conduct are three: (1) the fear of retaliation, (2) the fear of public reprobation and (3) the sympathetic sanction. The first operates with respect to civil and not criminal offences. It takes the form of either direct violence or sorcery, or both. But more important than retaliation is the fear of public reprobation. The Orokaivan, like most natives, is a man of extremely tender feelings, and the disapproval of his fellows makes him extremely uncomfortable. Even when the perpetrator of some wrong remains undiscovered and the victims do not know upon whom to vent their indignation, this sanction is still believed to be effective. Thus, when coconuts are stolen, the owner will tie a husk to a stick on the track near his palms; everyone will see that a theft has been committed,

¹ Malinowski, *op. cit.* supra p. 9, note 1, at 58. There is an ellipsis in this definition though the meaning is clear. A body of binding obligations cannot be regarded as a right or acknowledged as a duty. Perhaps the definition should be worded: "Civil law . . . consists . . . of a body of binding obligations which is recognized as specifying rights of one party and duties of the other. . . ."

² *Orokaiva Society* (1930), 327.

and the thief, although undiscovered, will feel a pang of shame whenever he passes the spot. The third sanction, a highly important one, is simply the fear of hurting the feelings of one's fellowman. When a man, for example, inadvertently mentions the name of his brother-in-law—a grave insult among the Orokaiva—he will throw up his hands with a despairing gesture and hang his head in shame and confusion; the brother-in-law, if he overhears the remark, will be deeply offended and covered with equal shame. Only a gift can restore harmony. Many, if not all, savages are gentlemen, in the sense that they have a regard for the feelings of others, Sir Hubert Murray¹ has observed, and it is this sentiment of friendliness toward all the members of the group which operates, at least among the Orokaiva, as a fundamental sanction. Professor Radin² believes with Professor Malinowski that to contend that law in our sense of the term does not exist, or exists only in an embryonic form in a primitive community, is to give to the term "law" too narrow a definition. In the primitive community, no less than in our own, he points out, the living together of individuals precipitates them into a mesh of rights, obligations and duties. With this general statement Driberg,³ who is especially familiar with African culture, is in agreement. European conceptions of law are not only irrelevant, he points out, but any assumptions in studies of primitive communities which are based on them are bound to prove fallacious; they have nothing in common with African cultures. The superficial observation that there is no

¹ *Papua of To-day* (1925), 223.

² *Social Anthropology* (1932), 95.

³ *At Home with the Savage* (1932), 214.

such thing as law among primitive peoples is, he holds, wide of the mark. The authority of law in such cultures, he believes, lies in its acceptance ; " it is the law because both tradition and practice in the main accept its rulings." The sanctions of law are to be found, he believes, in the principle of equilibrium and the so-called clan-consciousness. The commission of a wrong disturbs the individual or communal equilibrium and the law seeks to restore the pre-existing balance. On the other hand, the clan is regarded as a continuous entity comprising both the living and the dead. The law has the moral support, Driberg finds, not only of the living clan, but of all its dead members ; not only of the living tribe, but of all the tribesmen who have ever lived and died. This terrific antiquity is a potent factor in securing due regard for the law.

Dr Malinowski's definition, however, which is perhaps the most carefully considered from the anthropological position, if applied to Melanesian rules of conduct, distinguishes " legal " rules of conduct from " non-legal " rules of conduct. But it is at once apparent that if the definition is applied in advanced cultures it fails to accomplish this purpose. Are we then to conclude that " law " in advanced cultures is something different from " law " in primitive cultures, since neither Cardozo's nor Malinowski's definition, both admirably satisfactory from the point of view of the cultures for which they were framed, is applicable to other and opposed civilizations ? Assuming that Melanesian rules of conduct may be divided into two classes, and that Dr Malinowski is justified from the Melanesian point of view (and it appears that he is) in terming one of those classes " law ", then common sense suggests that as " law " in primitive

communities apparently fulfils the same social needs that "law" fulfils in advanced cultures, the "law" of both cultures, from a societal standpoint, is functionally identical. But from the point of view of definition this conclusion does not follow. Logically, the element of "the courts" in Cardozo's definition indicates a real and not a verbal distinction; he has, to employ Ogden and Richards' conception, indicated a distinguishing attribute and has not proposed a symbol substitution.¹ If we substitute the "state" for the criterion the "court" our difficulty is not overcome although the definition is broadened without any corresponding loss of definiteness. For anthropologists and political scientists are by no means agreed as to the omnipresence of the state in society. MacIver, who as a political scientist is far removed from the strictly legal approach characteristic of the work of, say, W. W. Willoughby,² denies emphatically and with great cogency that the state exists in very rude cultures.³ Lowie, with equal perspicacity, maintains a contrary position.⁴ Unfortunately Lowie nowhere in his study defines exactly what he means by the state; but by implication it is apparent that he has in mind in discussing the state in advanced cultures a conception which would be correctly stated in the following definition of MacIver's: "The state is an association which, acting through law as promulgated by a government endowed to this end with coercive power, maintains within a community territorially demarcated the universal external conditions of social order."⁵ This state, Lowie

¹ *The Meaning of Meaning* (1923), Chapter VI.

² *An Examination of the Nature of the State* (1896), *The Fundamental Concepts of Public Law* (1924).

³ MacIver, *The Modern State*, 40-2.

⁴ *The Origin of the State* (1927), Chapter VI.

⁵ MacIver, *The Modern State*, 22.

is quite prepared to demonstrate, has no existence in many primitive communities. What he does seek to prove is "that the germs of all possible political development are latent but demonstrable in the ruder cultures" and that a state of some type is everywhere a feature of human society.

The temptation to solve this perplexing problem upon the basis of some alluring hypothesis is almost irresistible. But the history of social theory is too largely a record of generalizations wrung from insufficient facts for us to-day to make similar errors. Anthropology has warned the jurist that his conception of law is perhaps egocentric but it has shown him that with its aid he may be able to work out a conception of law that will be adequate for all social requirements. Two obstacles at present stand in the way of the realization of this task: there is, first, a paucity of known facts concerning the simpler cultures and a lack of agreement among anthropologists with respect to the interpretation of such material as does exist; this is an obstacle which, as anthropological methods are refined, will disappear. There prevails, secondly, a confusion with respect to the instrument—linguistics—with which the anthropologist, the jurist or the social scientist must pursue his investigations and through whose medium he must state his conclusions. Superficially, linguistics presents no difficulties; the anthropologist is able to describe what he sees in a primitive community in words that convey meaning, and the judge on the bench is able to sentence a housebreaker to jail without inquiring in any ultimate sense, except from the housebreaker's standpoint, whether he is following a rule of law. But once the social scientist passes from these simple aspects

to the realm of theory, linguistics becomes a problem and it is in his struggle with this problem that he is most envious of the symbolism of the mathematician. Euclid may assume that through a point in a plane it is always possible to trace one and only one straight line parallel to a given straight line lying in the plane. Lobatchewski may deny this and assume that an indefinite number of non-intersecting straight lines can be drawn; and Riemann may deny both assumptions and assume that none can be drawn.¹ From these assumptions three geometries can be developed and the conclusions of each are consistent within their respective systems although they may differ widely from one another. It is not possible to deny, for example, admitting the primary postulates, that in Euclid's geometry the sum of angles of any triangle is always equal to two right angles and that in Lobatchewski's and Riemann's geometries the value of this sum varies with the size of the triangles. Linguistics, which occupies in the social sciences a position analogous to mathematical symbolization in mathematics, is not even remotely comparable in definiteness and utility to mathematical symbolization. Aristotle's postulate that man is a social animal is the oldest postulate known to the social sciences but there is not one word in it upon the meaning of which social scientists can universally agree. It is this basic difficulty and nothing else which led F. H. Bradley, perhaps the greatest of English philosophers, to remark, "on all questions, if you push me far enough, at present I end in doubts and perplexities".² Anthropology as it advances may throw light upon certain basic jurial concepts, such as the nature of law, and by enlarging

¹ A. d'Abro, *The Evolution of Scientific Thought* (1927), 35. Cf. Edwin W. Patterson, *Can Law be Scientific?* (1930). 25 *Ill. L. Rev.*, 121.

² *Principles of Logic* (1920), VII.

these concepts and giving to them a universal social significance it may also clarify the nature of some of the linguistic difficulties which at present are a barrier to any real advancement in the realm of theory.

(b) Legal History and Anthropology

When we pass to the question of the bearing of anthropological investigations upon certain aspects of legal history we see at once that in this field a connection between law and anthropology exists. Maitland, long ago, in a penetrating essay pointed out "that by and by anthropology will have the choice between being history and being nothing".¹ Pre-history, in its investigation of many manifestations of human culture, has accomplished much toward bridging the chasm between anthropology and history but in the field of social organization this chasm still exists. The origins of customs and institutions are irretrievably lost, even beyond the possibility of discovery by the prehistorian. We may know that Neolithic man domesticated sheep, cultivated various farinaceous crops and wore clothing made from the skins of animals, but it is extremely unlikely that we ever will be able to ascertain, except in the most fragmentary fashion—and from the standpoint of theory, valueless—the nature of Neolithic social organization. But anthropology can exhibit to us, in studies of ruder cultures, other forms of the customs and institutions which constitute the social organization of our particular civilization. When the facts of primitive social organization have been collected and compared on a more extensive scale than that with which the anthropologist at present works, it may be possible to

¹ 3 *Collected Papers* (1911), 295.

construct a scheme of social evolution which will be, if not history, at least the best available substitute for history. If to-day we are not warranted even in saying that the primitive customs and institutions which research discloses, *may* be the early forms of Western customs and institutions we can at least recognize the value of the study of social manifestations in early societies similar to those which exist in advanced cultures. Upon at least two of the main problems of legal history—property and the family—research in primitive societies may ultimately shed considerable light. It will be unnecessary here to indicate in detail the findings of anthropologists with respect to these two phases of social life. Lowie,¹ Goldenweiser,² Rivers,³ Malinowski,⁴ Briffault⁵ and others have summarized all that is at present known about these particular manifestations of culture. It will be sufficient for the purposes of this chapter to point out the bearing upon law and legal history of the conclusions resulting from some investigations into the primitive nature of property and the family.

When we try to understand the basic ideas underlying property and the family we find that no other subject can compete with anthropology as an aid to their clarification. The wealth and variety of forms that anthropology exhibits compel us to define our

¹ *Culture and Ethnology* (1917), *Primitive Society* (1920); *Primitive Religion* (1924).

² *Early Civilization* (1922), *History, Psychology and Culture* (1933).

³ *The Todas* (1906), *History of Melanesian Society* (1914), *Kinship and Social Organization* (1914), *Social Organization* (1924).

⁴ *The Family Among the Australian Aborigines* (1913), *Argonauts of the Western Pacific* (1922), *The Natives of Masliu* (Adelaide Trans. of the R Soc of S. Australia for 1915), *Myth in Primitive Psychology* (1926), *Crime and Custom in Savage Society*, *supra* p. 9, note 1, *The Father in Primitive Psychology* (1927), *Sex and Repression in Savage Society* (1927), *The Sexual Life of Savages* (1929).

⁵ *The Mothers* (1927).

concepts, if they are to possess validity, from the standpoint of all cultures. Either the definition must work in every community or it is insufficient. To base the definition of a concept upon the necessities and peculiarities of each community, and thus to have many definitions of the same concept, is, in effect, to deny the existence of the concept. Furthermore, if concepts are defined from the standpoint of all cultures social inquiry will be greatly assisted in its efforts towards the realization of an adequate social theory. Holdsworth, for example, states that, "Early law does not trouble itself with complicated theories as to the nature and meaning of ownership and possession . . . In fact the earliest known use of the word 'owner' comes from the year 1340; the earliest known use of the word 'ownership' from the year 1583."¹ But he then shows that "the smallest degree of civilization will produce the phenomena of ownership divorced from possession. Owners will lend or deposit or lose their property. The law must lay down some rules as to the rights of owners on the one side, and as to the rights of the bailee or the finder on the other."² Anthropologists have shown that some notion of property—whether certain forms are privately or communally owned is a moot question—is everywhere a feature of human culture. The question at once arises how the word "ownership" shall be defined. Malinowski insists that it is "a grave error to use the word ownership with the very definite connotation given to it in our society . . . the term own as we use it is meaningless, when applied to a native society."³ Lowie rightfully points out, however, that

¹ ² *Hist. E. L.* (3rd ed., 1923), 78.

² *Ibid.*

³ *Argonauts of the Western Pacific*, 117.

if we are to determine at what level of social development law distinguishes ownership and possession, "we cannot coin a special word for every shade of possessory right as locally defined in the far quarters of the globe. It is far more important to define all such rights conceptually than to devise an infinite series of labels for them."¹ In addition, new meaning will be added to many legal concepts if they are compared with the similar concepts held by the simpler peoples. Seisin, for example, in law means possession. The transference of a freehold interest in land was accompanied by livery of seisin, that is, the donee was put "into possession of the land, but the fact that it had thus been given was evidenced by handing over a stick, a hasp, a ring, a cross, or a knife."² This symbolic delivery of the land, known as livery of seisin, was an essential part of the conveyance. Livery of seisin is accounted for by the publicity attendant upon the act which prevented the perpetration of frauds by secret conveyances.³ Etymologically "being seized" is connected with "seizing", that is, to grasp at, or to take⁴; but Pollock and Maitland are inclined also to connect it with "to sit" and "to set" and thus it would seem to have the same root as the German *Besitz* and the Latin *possessio*.⁵ "The man who is seized is the man who is sitting on the land; when he was put in seisin he was set there and made to sit there."⁶ Anthropology tends to support the view of Pollock and Maitland

¹ 37 *Yale L. J.*, 555, supra p. 9, note 2.

² 3 Holdsworth, *Hist. E. L.*, 222.

³ *Ibid.*, 224.

⁴ Skeat, *Concise Etymological Dictionary* (1911), sub verb "seize"

⁵ Pollock and Maitland, 2 *Hist. E. L.* (1895), 29-30. Skeat is also some authority for this view.

⁶ *Ibid.* Cf. Joun des Longrais, *La conception anglaise du seisin du XII^e au XIV^e siècle* (1925), 166-7.

that the idea of seisin has more connection with the idea of "set" or "sit" than with the etymological idea of taking by violence. Basically property is conceived of as a part of the personality or self; it is a relation between the person and the thing. Something that the individual has touched or handled becomes imbued with a portion of his personality. "That which I have touched belongs to me; I put hand to it; it is mine. The property I hold is the expansion of my own person."¹ In early German law it was necessary, in order to reclaim cattle found in the possession of another, to place the right hand above a relic, a fetish, and the left hand on the left ear of the animal. The South African who touched a drinking cup thereafter regarded it as his. The natives of Baffin Bay and the Eastern Eskimo pass the tongue over objects as they are acquired.² It is an easy step from the idea that the thing possessed is connected with the body to the idea that it is necessary that there should be a physical contact of the donee with the thing transferred before the transfer is actually complete. Sociologically, this concept seems to be related to the idea of seisin, to the setting of the donee upon the land. A justification of the practice is found in the publicity which accompanies it, but at bottom it appears to be a development of the animistic conception of the relation between the personality and the thing.

Long before Spencer had made fashionable the idea that social development proceeded from "an indefinite, incoherent homogeneity to a definite, coherent heterogeneity",³ or, in other words, from simplicity to

¹ Sumner and Keller, *Science of Society* (1927), §108.

² *Ibid.*

³ *First Principles* (1862), Chapter XVII Cf. *2 Principles of Sociology*, 229.

complexity, Blackstone had attempted, by relying upon anthropological evidence, to account for the rise of the idea of private property upon the same principle. Originally mankind derived authority over the things of the earth from the Creator.¹ "This", Blackstone held, "is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject."² In the early stages of society, according to Blackstone, property was held in common.

And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that everyone took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity; as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times.³

But the notion that people of ruder cultures had undeveloped ideas of property was not confined to legal theory; it was a hypothesis that was also advanced by the earlier anthropologists. Morgan, for example,

¹ "And God blessed them, and God said unto them . . . have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." Gen. 1:28.

² 2 *Bl. Comm.* *3. "The airy metaphysical notions of fanciful writers" is perhaps a shaft aimed at Locke's theory of property. Cf. 2 *Treatises of Government* (1690), Chapter V. Previously Blackstone had pointed out (though without naming him) that Locke's theory of the origin of political societies through a social contract was "too wild to be seriously admitted" 1 *Bl. Comm.* *47.

³ 2 *Bl. Comm.* *3. Even at this stage Blackstone was careful to point out that community of ownership applied only to the substance and not to the "use". A man who lay in the shade of a tree could not be forcibly ejected, but having once abandoned the spot, another could occupy it unmolested by the original occupier or anyone else. *Ibid.*

in his *Ancient Society*, distinguished three levels of social development: savagery, barbarism and civilization. Savages, he believed, had feeble ideas of property. "The property of savages was inconsiderable. Their ideas concerning its value, its desirability and its inheritance were feeble. Rude weapons, fabrics, utensils, apparel, implements of flint, stone and bone, and personal ornaments represent the chief items of property in savage life. A passion for its possession had scarcely been formed in their minds, because the thing itself scarcely existed."¹ But as Lowie has shown, even among the most "savage" societies in Morgan's sense—the Yamana, the most southerly of South American tribes, and the Semang, a negrito people of the Malay peninsula—personal property is extensively held.² Though ownership of a particular piece of property does not in all cases vest the exclusive use in the owner, the line is, as Lowie shows, clearly drawn between what is one's actual due, and what is merely an ethical claim.

To-day the conception of primitive communism has been abandoned by legal historians and it has been found that real progress in the law lies in patiently working backwards towards the source of legal rules instead of beginning with a hypothesis and working forward, attempting at the same time to make each apparent advance conform with the hypothesis. Here, again, anthropological evidence aids in the undertaking, not only by assisting in the clarification of the legal rules but by serving as a check on such generalizations as may be advanced as historical work progresses. Thus, Holdsworth regards the distinction between corporeal

¹ *Op. cit.* (1877), 527.

² *Incorporeal Property in Primitive Society*, *supra* p. 9, note 2.

and incorporeal property as a characteristic of an advanced system of law : " The seignory of the feudal lord, rents, annuities, corodies, franchises, offices, advowsons, rights of common and other profits a prendre, easements, all are incorporeal things. What we must chiefly note is that all are treated [in medieval law] in many ways like corporeal things. The law can understand a corporeal tangible thing : it has hardly as yet arrived at a clear conception of an intangible right. The distinction between corporeal and incorporeal is not ready made. It is the mark of a mature system of law."¹ Maitland is even more positive in his opinion that the distinction between corporeal and incorporeal property is due to the genius of the law.

The realm of medieval law is rich with incorporeal things. Any permanent right which is of a transferable nature, at all events if it has what we may call a territorial ambit, is thought of as a thing that is very like a piece of land. Just because it is a thing, it is transferable. This is no fiction invented by speculative jurists. For the popular mind these things are things. The lawyer's business is not to make them things but to point out that they are incorporeal. The layman who wishes to convey the advowson of a church will say that he conveys the church ; it is for Bracton to explain to him that what he means to transfer is not the structure of wood and stone which belongs to God and the saints, but a thing incorporeal, as incorporeal as his own soul or the *anima mundi* . . . but we can not leave behind us the law of incorporeal things, the most medieval part of medieval law, without a word of admiration for the daring fancy that created it, a fancy that was not afraid of the grotesque.²

But both the idea that the popular mind regards rights as things and the idea that the distinction between them is the mark of a mature system of law are open to doubt. The first belief was due probably to the once widespread notion that there is a strong tendency on

¹ 2 Holdsworth, *Hist. E. L.*, 355.

² 2 Pollock and Maitland, *Hist. E. L.*, 123 and 147-8.

the part of individuals to personify all objects and phenomena and that this tendency was particularly strong among primitive people. The child who turns and strikes the chair against which he has stumbled has been an often cited example. This hypothesis we know to-day is no longer tenable. Even Lévy-Bruhl, who has argued brilliantly, if unpersuasively, for the theory that primitive man possesses a type of mind different from that of the mind of civilized man, admits that primitive man employs concepts.¹ Primitive man does not always give concrete form to qualities or actions, or endow them with anthropomorphic characters; he conceives and recognizes the intangible as well as the tangible, though whether his conception of the distinction is as sharply verbalized as that of civilized man, is, of course, another question. It is therefore of the highest interest to us when we learn that individuals in primitive communities own, sell and bequeath incorporeal property.² Examples of this form of ownership are numerous and are not confined to a particular geographical area but are well-developed among many primitive communities. A few instances of this form of ownership in the primitive social organization will illustrate its nature. Among the Central Eskimo the magical formulæ which the hunter sings to secure success in the chase are not communally owned but are the private property of the particular huntsman. Among the Greenland Eskimo the right to use spells is emphatically private property. There is, however, a limitation on the degree of ownership of

¹ *How Natives Think* (1926), 116.

² Lowie, who has been especially interested in this point, has collected many examples. *Incorporeal Property in Primitive Society*, supra p. 9, note 2, and *Primitive Society*, 235-43, cf. Wissler, *The American Indian* (1917), 174-5, *Introduction to Social Anthropology* (1929), 77.

this right. The owner of the right is not the absolute owner in the sense that the right is at his complete disposition; he cannot give it away. Only if the right is transferred for a consideration will it retain its effectiveness—a rationalization which Lowie believes is transparent. The sale involves a rough equivalent of the modern purchase of "good-will". "When a woman sells an incantation, she must promise that she gives it up entirely, and that the buyer will become the only possessor of its mysterious power."² Among the Andaman Islanders the right to sing certain songs, among the North American Indians and the natives of the Eastern Torres Straits Islands the right to recount legends, and among the natives of British Columbia the right to use certain names and magical formulæ are all regarded as private property which cannot be appropriated or used by others. Thus it appears that the existence of incorporeal property is a widespread feature of human culture. The recognition of the distinction between corporeal and incorporeal property by systems of law appears ultimately to be no more than a matter of form, although it is important to recognize that for a particular system of law the recognition, for certain periods of time, may have a profound effect upon its administration. In addition there is no reason, so far as is disclosed by present studies of primitive mentality, why primitive peoples should not recognize the distinction, though the present evidence is not clear on the point whether or not in fact they do so. Even if we should learn that the distinction between corporeal and incorporeal property is not recognized by primitive

² Jochelson, *Material Culture and Social Organization of the Koryak* (1908), 10 *Mem. Amer. Mus. Nat. Hist.*, 59. Quoted, Lowie, *art. suprap.* 9, note 2 at 555.

peoples, anthropology at least warns the legal historian that incorporeal property is not a development of advanced cultures but is a characteristic of all cultures.

When we consider another aspect of the problem of property—that of inheritance—we find that here also anthropology can be of material assistance. Maitland clearly recognized the importance of an adequate understanding of the rudiments of family law in connection with the unravelling of the mystery of the rules governing inheritance. “So long as it is doubtful whether the prehistoric time should be filled, for example, with agnatic *gentes* or with hordes which reckon by ‘mother-right’, the interpretation of many a historic text must be uncertain.”¹ At the time he wrote, the concept of “mother-right”, particularly in Germany, from whose scholars he derived much of his inspiration, exercised a powerful influence, and although he did not accept the concept, it had an appreciable influence on his thought. His consideration of this concept led him to the penetrating conclusion that “family-ownership” was really not the origin but the outcome of intestate succession.² This conclusion, with the modification that intestate succession is but one of the contributing factors, is accepted by anthropologists to-day. From this point Maitland, however, proceeded further and evolved a theory to account for the origin of the testament. He began by imagining “a time when testamentary dispositions are unknown and land is rarely sold or given away”.³ A law of intestate succession becomes fixed and immutable. Each heir knows exactly what share of his

¹ 2 Pollock and Maitland, *Hist. E. L.*, 237.

² 2 *Ibid.*, 247.

³ *Ibid.*

ancestor's estate he will receive ; the ancestor knows to whom the proper share of his possessions will pass. "What else should happen to it? He does not want to sell it, for there is no one to buy it ; and whither could he go and what could he do if he sold his land? Perhaps the very idea of a sale of land has not yet been conceived."¹ But in course of time wealth is amassed, purchasers are desirous of acquiring the land, and bishops will confer spiritual benefits for a gift. There is a struggle, and law must decide whether or not the claims of expectant heirs can be defeated. There will be a compromise, a series of compromises, and then there will be a recognition of testamentary dispositions. This, in brief, is Maitland's theory which has also been adopted by Holdsworth who states it perhaps more explicitly.² Both Holdsworth and Maitland recognize the theory as a product of "bookland" and not of "folkland". What went on beneath the surface of the books in the world of actuality is hazy but the written records, in part at least, support the hypothesis. When we turn to anthropological evidence we find that the forms of inheritance are protean. First of all the practice of testation is not infrequent, though, as in modern times, there may be limitations upon it. Among the Fantis of West Africa the customary law does not permit any person to bequeath to an outsider a greater portion of his property than is left for his family. Among the Maoris land obtained by purchase or conquest may be given away or willed by the owner to anybody he thinks fit, but the case is different with patrimony.³ A Plains Indian

¹ 2 Pollock and Maitland, *Hist. E. L.*, 247.

² 2 Holdsworth, *Hist. E. L.*, 92 et seq.

³ 2 Westermarck, *Origin and Development of the Moral Ideas* (1917), 43.

cannot transmit the rights acquired through fasting for a vision because of the principle that such rights can only be acquired by like visions or by purchase.¹ Among some tribes, such as the Maidu, the Assiniboin and the Pima, all the decedent's effects are destroyed, thus greatly simplifying the rules of inheritance. Again, there is a principle that articles peculiarly applicable to a particular sex shall pass to that sex. Women's clothing, for example, passes to the female kin and a man's weapons pass to the male kin. Primogeniture, though rare, also occurs, as does "borough-english" or "junior-right" as it is known ethnologically.² In short, the forms of inheritance are multitudinous and do not appear to follow a particular law of development. Many factors—religious, psychological, economic, historical—all, briefly, but those of logic—contribute to the establishment of the particular form which obtains. It certainly does not seem to be satisfactory to account for the origin of inheritance and testamentary disposition by imagining "a time when testamentary dispositions are unknown and land is rarely sold or given away". From the anthropological facts now available it does not appear possible to account for either the various forms of inheritance or for the fact of inheritance itself. Westermarck has suggested that inheritance may have a psychological origin, and, though the theory he has developed to support the idea is not satisfactory, it is possible that we may ultimately recognize this as the true basis of the practice.³

Before passing to the question of family law, it will be convenient at this point to discuss briefly the rule of

¹ Lowie, *Primitive Society*, 243-4.

² *Ibid.*, 243-55.

³ 2 Westermarck, *op. cit. supra* p. 35, note 1, at 51.

the early common law with respect to tortious acts. Under the medieval common law a man was liable for all the harm which he had caused another by his act, and accident was no defence. A man acted at his peril. "It is clear", writes Holdsworth,¹ "that this principle of civil liability rests ultimately upon a very primitive basis. It obviously takes account, not of the moral shortcomings of the defendant, but only of the loss of the plaintiff." The history of this rule has been thoroughly studied by Wigmore,² who cites many instances from early English law and other primitive legal systems. It is well illustrated by his first example, a popular story from Northern mythology :

Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things—fire, water, stones, trees, and all—not to harm Baldur ; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt ; and going in disguise to Frigga, he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went up to Hodur, the blind god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoetwig and guided his hand, and the twig flew, and struck Baldur lifeless. Then the other gods were for laying strong hands on the murderer ; but they were in a sacred place. And Hodur fled. And Odin said, "Now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades ?" The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his hair until he had fulfilled his vengeance and smitten to death the slayer of Baldur.

Anthropology here merely confirms the primitive basis of the rule, which has its counterpart in many of the ruder communities.³ Thus, it is interesting to observe

¹ 8 Holdsworth, *op. cit. suprap.* 24, note 1, at 447, cf. 2 *ibid.*, 52, 3 *ibid.*, 375

² Responsibility for Tortious Acts (1894). 7 *Harv. Law Rev.*, 315, 383, 441.

³ Westermarck has collected a number of examples. 1 *op. cit. supra* p. 33, note 3, at 307 from which most of those which follow are taken.

that a law of Henry I, which provided that where a man puts down his arms somewhere, and another takes them and does harm with them, or where he has left them with a polisher or repairer and the like happens, the owner must free himself by oath, has its stricter equivalent among the Ossetes. According to the law of this community, if a stolen gun explodes in the hands of the thief who is carrying it away, and kills him, the thief's kin has a just feud against the owner of the gun. In the Mosaic law, a distinction was drawn between the presence and absence of enmity in the slayer, but it was not observed with respect to carelessness and misfortune.¹ But great progress was made in this respect by the later legislation of the Jews. The Rabbis, Westermarck points out, took considerable pains to distinguish between purely accidental homicide and homicide due to carelessness; they exempted the former from all punishment, whereas the latter incurred the punishment of confinement to a city of refuge. They also drew a distinction between cases in which the death was the result of carelessness of the agent and cases in which the deceased contributed to it by some blamable act of his own. A father or teacher who unintentionally caused the death of a son or pupil while punishing him, and a person who by order of the Sanhedrin inflicted corporal punishment on a culprit and by mistake killed him—such persons escaped punishment altogether. But, as Driberg² points out, the harshness of the rule of absolute liability is sometimes mitigated by a recognition of the fortuitous circumstances leading to the accident. As an example, he cites the case of a man who was

¹ Numbers xxxv. 16, et seq. Deuteronomy xix. 4, et seq.

² Op. cit. *supra* p. 17, note 3 at 217

lopping the branch of a tree which overhung the public path, and who by accident fell upon a passer-by with such force and accuracy as to break his neck. The family of the unfortunate man demanded the execution of the offender upon the principle of the *lex talionis*. It was pointed out to them, however, that the death of their relative was the result of a sheer accident and that it would be unjust to push the letter of the law to such an extreme. But the family refused compensation and demanded their pound of flesh. Judgment was therefore given that the accused was guilty of homicide and that the prosecutors were legally justified in demanding his death. But it was held that the *lex talionis* must be faithfully observed. For a whole day the accused would walk up and down the path under the tree on which he had been at work, and during that one day a member of the deceased's family would have the privilege of repeatedly climbing the tree and falling on the accused until he had succeeded in landing upon and breaking the accused's neck. Which member of the family, it was inquired, would volunteer to give effect to this strictly legal judgment?

In turning to the problems of family law we pass to a consideration of the most fundamental and universal of all societal institutions and one which occupies a central position in all legal systems. What form the earliest human groups assumed is one of the most difficult of anthropological problems. Briffault, who in recent times has most thoroughly investigated the problem, believes that the human group did not develop out of the animal herd and did not consist in the first stages of its development, of small isolated groups corresponding to what we understand by families. His opinion is that

the earliest human societies developed out of some form of animal assemblage and that they were, like all animal groups, primarily reproductive in function, and not like existing human groups, co-operative organizations.¹ The most primitive form of marriage he believes to be group marriage which is exclusively sexual in its object.² Individual marriage, on the other hand, had its foundation in economic needs.

What, in uncultured societies we call marriage, far from being a means of satisfying the sexual instincts, is one of the chief restrictions which have become imposed upon their operation. Those restrictions, being the effect of marriage, are necessarily non-existent before it; unmarried females, outside the prohibited classes or degrees, are accessible to all males. In all uncultured societies, where advanced retrospective claims have not become developed, and the females are not regularly betrothed or actually married before they have reached the age of puberty, girls and women who are not married are under no restrictions as to their sexual relations, and are held to be entirely free to dispose of themselves as they please in that respect. To that rule there does not exist any known exception.³

Primitive man's motive in entering into individual marriage is to obtain the economic advantage of personal service which a wife bestows upon him; the marriage is not entered into with a sexual object in view. With the development of agriculture in its higher forms, the accumulation of wealth became possible, women accordingly lost their economic value as workers and the economic need out of which individual marriage has grown ceased to exist.⁴ Woman lost her status as chief producer, and became economically unproductive, destitute and dependent. Thus she turned to the cultivation

¹ *The Mothers*, 194 et seq.

² *Ibid.*, Chaps. XI-XII.

³ *2 Briffault, The Mothers*, 2 et seq.

⁴ *Ibid.*, 251.

of charm, and in the course of time the sexual element again became the chief factor of marriage.¹ This, in brief, is Briffault's statement of social development. It is opposed in many vital points to the theory first advanced almost forty years ago by Westermarck, whose *History of Human Marriage* has ever since been generally accepted as the authoritative statement on the subject. Westermarck maintained that marriage had a biological origin, i.e. that it was an outgrowth of marriage habits which prevailed among animals.² Westermarck is an anthropologist of immense learning and the material which he collected to support his theory was overwhelming. His influence in the field of family research has been extensive and certain hypotheses which he endeavoured to establish have been generally regarded as irrefutable. So great an authority as Havelock Ellis has stated that "a completely adequate history of marriage we can hardly expect to see. No one person could master all the disciplines of study that must go to the making of it, and the separate work of a group of experts, each in his own field competent, could not be fused into any living and harmonious whole",³ and he believes that to-day the nearest approximation to such a completely adequate history is the work of Professor Westermarck. The fact that the field is too vast for anyone single-handed to master, accounts in large measure for the circumstance that Westermarck's supremacy has for so long remained unchallenged. A re-examination of his material has appeared to be an undertaking which not only would occupy the major portion of a lifetime but would, in view of the great

¹ 2 Briffault, *The Mothers*, 254.

² 1 *History of Human Marriage* (5th ed 1922), Chapter I.

³ 7 *Studies in the Psychology of Sex* (1928), 492.

authority accorded his conclusions, perhaps lead to no advance. It is to the great credit of Briffault that he undertook such a re-examination and brought it to a successful conclusion, with the result that the general conception of the development of the family and marriage has been modified in many important respects. In the works of Briffault and Westermarck we have the most complete and scientific studies, from the societal standpoint, of a subject which is of the most universal and fundamental importance.

It is important first to recognize that, historically, marriage is primarily a social or juridic institution.¹ Various definitions of marriage have been offered from time to time, but no definition yet proposed has been at the same time so flexible and yet so definite that it covers all forms. The task confronting the anthropologist is to understand what is meant by marriage, as distinguished from other sex relations, by the people who draw such a distinction.² In primitive communities the distinction appears to rest mainly upon the fact of whether or not children are born of the union.³ The question of the degree of permanency of the union does not enter into the matter. With the passage of time other conditions are imposed until we reach the stage where it is held that a ceremony is necessary to establish the relationship. At first the relationships which are not juridic are not regarded as irregular or subject to censure; but there is an inevitable tendency, as Briffault points out, apart from all other factors and considerations, "in a juridically established relation to cause a depreciation

¹ MacIver has been one of the few sociologists to inquire the meaning of "institution". He defines it as "a form of order established within social life by some common will" *Community*, Book II, Chapter IV.

² ^a Briffault, *The Mothers*, 93.

³ *Ibid.*, 69-88.

in the esteem in which relations not so established are held."¹ But the point of paramount importance which we must recognize is that there is in most communities a form of sexual relationship as distinguished from other forms which is invested with juridic attributes.

It is this form of sexual relationship which lies near the core of all legal systems. An adequate history of law and a sound philosophy of law cannot be written without an understanding of the social history of the institution and it is almost entirely upon anthropology that we must depend for this understanding. No one was more keenly aware than Maitland of the desperate need for sound anthropological evidence to complete the gaps in legal history which ordinary methods of research could not fill.² Marriage among the Anglo-Saxons appeared to consist of a sale of "mund" by the parents or guardians of a woman to the husband.³ Maitland's opinion was that the sale of the "mund" was not the sale of the woman as a chattel but it was the sale of the protectorship over the woman. She assumed an honourable position as her husband's consort.⁴ It is highly important historically to know whether a legal distinction existed between the purchase of property in the wife and the acquirement of authority over her. For many years it was disputed among anthropologists whether or not the sale of the "mund" was really "wife-purchase" or a sale of a protectorship. To-day the general view is that it was the sale of a protectorship.⁵ But wife-purchase

¹ 2 Briffault, *The Mothers*, 96.

² Cf. 2 Pollock and Maitland, *Hist. E. L.*, 237

³ *Ibid.*, 362-3, 2 Holdsworth, *Hist. E. L.*, 87.

⁴ *Ibid.*

⁵ 2 Westermarck, *History of Human Marriage*, 412, 1 Howard, *History of Matrimonial Institutions* (1904), 260.

was not a practice peculiar to the Anglo-Saxons or the Teutons but was widespread among primitive tribes and even among peoples who reached a high degree of culture such as the Chinese, the Semites, the ancient Arabs and Greeks, and the Hindus. Out of the practice of wife-purchase arose, by gradual steps, the practice which obtained in many communities of providing the wife with a dowry. It is of great value to us to understand a peculiar marriage practice in one legal system in relation to similar practices in other legal systems. And it is only by attaining universal perspective that we shall be able to understand the phenomena of social development in any adequate sense.

It is important to note that while anthropology may be of great assistance in expanding and clarifying legal concepts and practices it may also show that these concepts and practices have their origin in superstition, fear, vanity or some other ignoble source. This, however, as Sumner and Keller point out,¹ is no sufficient reason for condemning a concept or a practice. Astronomy grew out of astrology and medicine began with the exorcising of evil spirits. The test to apply is whether the concept or practice in its historical setting possesses social worth. And anthropology can aid not only in the enlargement of our comprehension of the legal concepts associated with property and the family, but it can also assist materially in determining the present value of those concepts.

(c) Law and Anthropology in Action

When we turn from the historical and conceptual relation of law and anthropology to the problem of law

¹ *Science of Society*, §113

and anthropology in action we pass to a question which may seem remote from problems of jurisprudence. Nevertheless, it is one of the gravest problems of world politics. It is the problem of the system of justice to be adopted by the dominating power in colonies populated by people of simpler culture. Lord Lugard's admirable volume, *The Dual Mandate in British Tropical Africa*,¹ well illustrates the difficulties accompanying this task and is the best text for this discussion. In the British African Tropical Dependencies the fundamental law, applicable alike to Europeans and natives, is the English common law and principles of equity, administered concurrently, and the statutes of general application which were in force in England at the time the administration was created. This body of law may be modified by Acts of the Imperial Parliament, by orders of His Majesty in Council, and by local ordinances. To apply this law to the exclusion of all other law would, it was found, result in inequities and hardships, and accordingly it was provided that the British Courts in civil cases affecting natives (and non-natives in their contractual relations with natives) should be guided by native law, religion and custom. This is contrary to the system prevailing in French Tropical Africa where if either party is a European, French law is always applied to the exclusion of native law. It was found in practice that many native rules of law or custom were repugnant to European ideas of propriety and the further proviso was made that the rules would not be enforced if they were contrary to "natural justice and humanity". Thus a native law which compelled the destruction of twins

¹ (1922), Chapters XXVII-XXVIII, cf. Maene, *Village Communities in the East and West* (1882), Chapter, The Theory of Evidence.

would not be enforceable ; indeed if it were enforced the act of destruction would be regarded as an offence. In addition it was found necessary to change many procedural rules. Thus a Chief Justice, lately arrived from England to assume his duties, was greatly surprised when an accused man pleaded guilty of having turned himself into a hyena at night and devoured children, because there was a consensus of village opinion that he had done so. At present a plea of not guilty is entered on behalf of an illiterate accused, and in capital cases the evidence, generally speaking, must be sufficient for conviction irrespective of the assertions of the accused. Equally difficult of solution is the problem of punishment. The Koran prescribes death by stoning for the offence of adultery. This manifestly could not be enforced by a British court and as the Moslem judges insisted that, at least, for the moral effect, there should be administered a light birching on the shoulders, a compromise was reached by which the person who inflicted the chastisement kept some cowrie shells under his armpit so as to prevent the raising of the arm to strike with force. If the cowries dropped the culprit was reprieved. This brief summary indicates the nature and extent of the problems confronting a nation assuming control of a native dependency.

But to leave the reconciliation of native and foreign law to the standard of "natural justice and humanity" is plainly inadequate for the simple reason that "natural justice and humanity" is a concept totally devoid of definite meaning. Even Lord Lugard admits, in connection with the question of infliction of corporal punishment upon a woman that "it is questionable whether in the circumstances it could be said to be

'repugnant to natural justice and humanity.'” And when we approach the delicate problem of slavery we find, particularly in other parts of Africa, that as a criterion it is of no value at all. It is here that anthropology can render assistance of immediate and practical benefit. For administrators to enter territories with whose custom and law they are totally unfamiliar and to set up systems of justice which are expected to function equitably is absurd. It is to the anthropologist who is intimately acquainted not only with the peculiarities of the particular territory, but with the principles of social organization which obtain in other primitive communities as well, that the administrator must turn for help. With such assistance a system of justice adapted to the specific territory can be erected which will function with a minimum of friction.

These principles, it should be added, are rapidly gaining recognition in modern colonial jurisprudence. “The modern tendency has been,” Lindley¹ writes, “although examples to the contrary are not wanting, to leave the natives inhabiting the colonial possessions of European Powers under the regime of their own laws and customs, to preserve to them their institutions, and protect them in the exercise of their religion, and to educate them gradually to such progressive ideas and methods as may be suitable to their condition. And where an opposite policy has been adopted, it has been generally recognized as improper and contrary to the usual colonial practice. Thus it was one of the charges brought against Germany in respect of her colonial administration that she had ‘disregarded native laws

¹ *The Acquisition and Government of Backward Territory in International Law* (1926), 374. Cf. Snow, *The Question of Aborigines in the Law and Practice of Nations* (1919), Chapter VIII.

and customs, broken up certain tribes', and degraded the native chiefs." It is interesting to note that long before the wisdom and the justice of these principles had been recognized in the colonial practices of advanced cultures, they had been adopted as a part of the colonial policy of the Inca civilization. "The Incas respected the organizations they found among the people who came under their rule", writes Sir Clements Markham,¹ "and did not disturb or alter the social institutions of the numerous tribes they conquered. Their statesmanship consisted in systematizing the institutions which had existed from remote antiquity, and in adapting them to the requirements of a great empire." The next step in accord with this policy—the careful study by capable anthropologists of the legal and customary systems of primitive peoples in colonial areas—has already been undertaken. It is only necessary in this connection to refer to Captain Rattray's² investigation of legal and constitutional procedure among the Ashanti, a model example after which similar studies in the future may be patterned with profit.

CONCLUSION

We thus find, to return to our original problem, that although specialized, there is, along certain lines, a real relationship between law and anthropology and that anthropology can be of assistance in the solution of many legal problems. There is, though, one final warning which must be heeded if there is to be a genuine advance in co-ordinating the relationship of these two subjects. Anthropology has always been a fascinating subject

¹ *The Incas of Peru* (1910), 161. Cf. Landley, *ibid.*

² *Ashanti Law and Constitution* (1929).

from which to draw support for many social theories. Hobbes' idea of a state of nature was influenced by the contemporary knowledge of primitive life; Locke's² principal example in support of his contentions was the "Indian"; and Rousseau's³ "Noble Savage" has become legendary. But as Professor Myers pointed out more than twenty years ago, "the very questions which philosophers have asked, the very questions which perplexed them, no less than the solutions which they proposed, melt away and vanish, *as problems*, when the perspective of anthropology shifted and the standpoint of observation advanced."⁴ Not only is it important to ask the right question, as Bacon showed, but it is equally important to test conclusions based upon anthropological observation with all the available evidence and not merely to support them by facts selected to fit the problem.

¹ *Leviathan* (1651), Chapters XIII and XX.

² *Essay concerning Human Understanding* (1690), Book I, Chapters III-IV. *Two Treatises of Civil Government* (1690), *passim*.

³ *Discours sur l'Inégalité* (1754), Part I.

⁴ The Influence of Anthropology on the Course of Political Science (1916), *Univ. Cal. Pub. Hist.*, 75.

CHAPTER III

ECONOMICS

SEVERAL foci suggest themselves as points of departure for a systematic consideration of the inter-relations of law and economics, but the most fundamental and the most profitable would seem to be those points conceptualized as "institutions" and "associations", from which all social lines seem to radiate and to which all seem to converge. All institutions and associations are social institutions or social associations but some are at the same time both legal and economic. These legal-economic institutions and associations have occupied the attention of jurists, economists and philosophers for many centuries. In the hands of certain of these groups particular institutions or associations have been the subject of exhaustive analysis and interpretation. Whether or not the economic analysis, or the philosophic analysis as it has found expression in economic thought, of institutions and associations which are part of the framework of the law is an aid to the legal understanding of them is the purpose of this inquiry.

The term "institution" in social theory, like the term "experience" in philosophy, is used in many senses and with a looseness that amounts to a positive hindrance to the advancement of social thought. It is a refuge when difficult problems are in the way and its use gives a cast of sanctity and profundity to discourse

which an adequate analysis would not permit. It is a term which is difficult to define with precision. Everyone agrees that property, marriage and capitalism are institutions. Are the family and prostitution institutions? Is the gas company an institution? Plainly the gas company is not an institution, and the problem is to distinguish between the class embracing the gas company and the class embracing property. The first class is termed "associations" and the second "institutions". An association is a group of persons organized for a common purpose. Thus the church, the army, the family, the gas company, are associations and not institutions. Institutions are the sanctioned modes of social control, the social forms regulating behaviour in society.¹ Institutions are concepts or ideas; they are not things although they are generally connected with things. Associations frequently embody institutions, but an association does not always imply an institution as the concept "son" always implies "father". Baptism is an institution embodied in the association church. Interest for the use of money, and prostitution are institutions which are independent of all associations. Institutions are the social forms through which, in large part, society functions. They come into being to fulfil social wants and though they may persist, in some instances, long after the necessity for them has passed, their extinguishment in the end is certain if the social need which created them no longer exists.

¹ Sumner, *Folkways* (1906), 53-5, Cooley, *Social Organization* (1909), Chapters XXVIII-XXIX, MacKenzie, *Outlines of Social Philosophy* (1918), 62-4; Cole, *Social Theory* (1920), 41 et seq., 196 et seq.; MacIver, *Community* (3rd ed. 1924) Chapter IV; Idem., *The Modern State* (1926), 6-7, Idem., *Society* (1931), 12-17; Chapin, *Cultural Change* (1928), 44.

The following would appear to be the principal institutions and associations which are, at the same time, both legal and economic :

A. Institutions

1. Property
2. Contract
3. Succession
4. Money-lending
5. Taxation
6. Business

B. Associations

1. Corporations
2. Labour

They will be discussed in the above order, which is an order of convenience and not of importance from either the legal or economic point of view. First, however, since the claim is sometimes put forward that economics is the most advanced of all the social sciences, the attempt will be made to ascertain its scientific status in the hierarchy of the social and natural sciences.

I. THE SCIENTIFIC STATUS OF ECONOMICS

In its ideal, economics does not differ from physics, chemistry or biology. Like those sciences, economics attempts to discover the laws which operate in its domain and to explain, by theory or hypothesis, the laws which it discovers. It is a necessary assumption of economics—as of physics, chemistry or biology—that such laws can be discovered ; it is the expectation of economists that if laws are discovered they can be successfully explained, but this belief is not a necessary premise of the science. The existence of economic facts (i.e. things possessing

qualities and relations connected with wealth'), to the ascertainment of which economists now devote more effort than to the hypothetical aspects of the subject, is sufficient warrant for the premise, if indeed it needs justification. The laws of the natural sciences are, however, marked by precision, universality and certainty, and it is these characteristics which are generally regarded as the elements which distinguish the natural sciences from the social sciences—to the disadvantage of the social sciences.

Although the contrary is frequently asserted, there appears to be no generic difference between the social sciences and the natural sciences, just as there appears to be no generic difference between the separate branches of natural science. All sciences in their elementary stages are classificatory sciences, although the substantiation of this in the case of mathematics must, of course, be conjectural. What seem to be simple objects, events or sequences are arranged in classes according to similarities or periodicities. By mental processes which are still obscure, the analysis of rudimentary classifications yields abstractions in which the perceived objects, events or sequences are conceptualized and, with the assistance of symbols, are dealt with as concepts. A particular science, by becoming abstract, attains a standpoint from which all its data can be subsumed without actual perception. Science must deal with the typical or the abstract, though the typical should always be, as Einstein has insisted, the observable. The entities of the science having been conceptualized, rules or laws describing their relations are stated and extended by hypothesis to

¹ Cf. Russell, *Our Knowledge of the External World* (1915), 51, MacIver, *Community* (3rd ed 1924), §1.

other divisions of the subject. If the universality of the law is substantiated by observation or experiment it is regarded as a scientific law.² The natural scientist does not attempt to explain the generalizing qualities of the mind by whose aid it would appear that laws are formulated; he assumes the generalizing qualities as a fact, the explanation of which he leaves to psychologists; similarly, he leaves to philosophers the question of whether or not the entities with which he deals are real entities; on both these questions he is content to take the superficial view of what may be called common knowledge. In addition, whether or not science should venture to explain the laws which it formulates is a debatable question. Many scientists believe that the explanatory aspects of science are parasitic growths; nevertheless, scientists continually set up hypotheses to explain the laws which have been developed. The primary object of all science is to reduce its data to a form which will admit of its utilization for the formulation of laws of universal validity. In this respect, because of the nature of the subject matter, some sciences are much more successful than others; very quickly, as in arithmetic, geometry and mechanics, a stage of abstraction is reached which permits advances to be made with such rapidity that their application to observable data is not apparent for long

² Hobson, *The Domain of Natural Science* (1923), Chapter II, Jevons, *The Principles of Science* (1892), Book IV, passim; Pearson, *The Grammar of Science* (2nd ed. 1900), Chapter III, Bliss, *Organization of Knowledge and the System of the Sciences* (1929), 224; Cohen, *Reason and Nature* (1931), Chapter III, §1. Definitions of a "law" range from Poincaré's definition of physical laws as differential equations (*Foundations of Science* (1921), 292) to the fruitful conception of the logical positivists of a law as a model for building true propositions (see Blumberg, *Demonstration and Inference in the Sciences and Philosophy* (1931), 42 *The Monist*, 577). Professor Cohen has in mind the conception generally held when he defines a law as "the statement of a universal abstract relation which can be connected systematically with other laws in the same field". *Ibid.*, 358.

periods of time. From the point of view of the degree of conceptualization of these sciences, and the precision, universality and certainty of their laws, they are regarded as the most highly developed sciences and as models to which other sciences should attempt to conform. But because the majority of the natural sciences have not reached the advanced abstract stage of a science such as geometry it does not follow that there is a generic difference between these sciences and geometry; neither does it follow that because some of the natural sciences find it possible to utilize the precise language of mathematics to a greater extent than the social sciences, that there is a generic difference between these divisions of knowledge.

The scientific status of economics will be determined by the precision, universality and certainty which its laws exhibit, and not by the degrees of difference between it and such a science as geometry. From this point of view the characterization of economics as a deductive science, an inductive science, a hypothetical science or a statistical science, is meaningless; furthermore, it is unlikely that the ascertainment of the fundamental nature of economics would facilitate the discovery of its laws. Until, and perhaps even after, it becomes exclusively mathematical its laws will be set up as a result of the employment of all methods of research. The exceptional obstacles confronting the economist in his search for economic laws will have to be overcome precisely as they are overcome in the natural sciences. The existence of such obstacles does not imply that economics differs in its nature from the natural sciences. Difficulties such as the elimination of personal bias are sometimes as serious a problem in the natural sciences as in the social sciences. In anatomy, for example, the

measurement of cerebral sexual differences has been so influenced by personal predilections that it is only within recent years that results of scientific value have been obtained. As in all sciences, the question which the economist should ask is, How scientific (i.e. how precise, universal and certain) are the economic laws which have been set up? The answer to this question will determine the scientific status of economics.

Economics is no exception to the rule that the final discovery made by a science is the discovery of what that science is really about. Immense confusions in current economic theory with respect to this point hinder the development of the formal systematic aspect of the subject; but they do not, however, prevent the discovery of economic laws. Arithmetical laws were known long before the nature of arithmetic was fully understood.

The obvious starting point of economics is society. Some economic laws obtain where societies are non-existent; Robinson Crusoe would have found that the so-called law of diminishing returns of agricultural produce operated as effectually in the Island of Juan Fernandez, before the coming of his man Friday, as in the British Isles. This suggests that economic laws are of two classes: (*a*) those, such as the law of diminishing returns, which are based directly upon the data of chemistry, physics and biology, and (*b*) those which are a function of social activity and come into existence only when society reaches a comparatively advanced stage of development. An example of this latter class is the law that prices tend to the level at which demand is equal to supply. Laws of the first class, like physical laws, operate in all living societies, human and non-human. A piece of grain dropped by an ant over the edge of its

nest obeys Galileo's law of falling bodies exactly as does a rivet dropped by a workman from the top of a skyscraper. The speed of the falling grain has obviously no relation to the fact that it was dropped by an ant ; similarly, the fact that the law of diminishing returns holds true for the mushroom-growing ants has no connection with the fact that the soil on which their produce is raised was cultivated by them. It may be objected that laws of this class are not economic laws, but laws of chemistry or biology or physics. But it may be answered that they are framed with reference to the economic system, stated in economic terms and applied to the economic world ; from this standpoint they may fairly be called economic laws. Laws of the second class are generally more difficult to ascertain. Because of the large number of variables with which they deal they are generally less precise and certain, and their universality is limited by the developmental limits of the social system. The law of supply and demand cannot, for example, obtain in social communities, such as that of the ant, where exchange does not exist. The law might be reformulated in terms of teleologic values and would perhaps then be applicable to ant communities but it would cease to be applicable to human communities where exchange-value is a basic element.

Most economic discussions begin, instead of end, with analyses of motives ; it is assumed that motive is one of the fundamental notions of the subject. But it appears to make little difference, in its economic theory, as Tugwell has pointed out,¹ what an economic treatise says about the psychology of value ; the substance of the discussion is always familiar. Some writers, such as

¹ *The Trend of Economics* (1924), 16.

Fetter and Florence,¹ have attempted to avoid psychological premises and have based their discussions on facts which had no immediate psychological implications. The role of motive in economics is not as one of the assumptions of the subject but as one of the elements in the theory or hypothesis which explains an economic law. Its function is essentially an explanatory one and as such it has no place in the premises of the subject or in its laws. We need not here enter into a discussion of the place of explanation in science; Comte² long ago condemned it in unsparing terms; Meyerson³ to-day insists, with elaborate historical evidence, that science is not restricted to description but that explanation is one of its essential elements. In economic theory explanation occupies an important place and has led to fruitful research. But economic laws should not be formulated in psychologic terms; such a law as "Buyers try to buy at the lowest prices; sellers try to sell at the highest prices" is primarily a psychologic law and not an economic law. Economic laws should be concerned directly with economic facts. The explanations of such laws may be psychologic; but that is not the primary problem of the economist.

It is evident to-day that the economic laws which have been set up have not been stated in terms which may be regarded as final; as the laws are reformulated in the light of increased knowledge it is safe to assume that their precision, universality and certainty will be

¹ For a discussion of the quarrel over psychological principles see Suranyi-Unger, *Economics in the Twentieth Century* (1931), 216.

² *Cours de philosophie positive* (4th ed. 1877), 169. Quoted, Meyerson, *Identity and Reality* (1930), 48. Cf. Bridgman, *The Logic of Modern Physics* (1928), 37-52, who takes the position that in modern physical phenomena we are confronted with an explanatory crisis.

³ Op. cit. supra note 2.

greater. Dr Har,¹ in a detailed study of social laws in general, concludes that there are none exhibiting the precision and certainty which characterize the laws of chemistry and physics, though he would seem to believe that of all social laws those classable as economic are the most advanced. The curve of population growth, which has been found by Pearl and Reed to describe with remarkable precision the growth of populations, is perhaps the closest approximation in the realm of economics to a descriptive law of nature. "It seems to us", they² write not unwarrantably, "fairly to correspond in a modest way, to Kepler's law of the motion of the planets in elliptic orbits, but to lack the heuristic element which Newton added in showing that gravitation would account for elliptic orbits; or to Boyle's law prior to Clerk Maxwell's kinetic theory. . . . Nothing in the mathematics . . . or their successful application . . . gives the slightest inkling of the nature of the causes lying behind" the cyclical growth of populations. To-day economics awaits both its Kepler and its Newton. But it would appear inevitable that additional economic laws comparable to the laws describing planetary motion will be formulated and that they will be rationalized and extended in Newtonian fashion so as to embrace the entire economic system.

II. A. INSTITUTIONS

1. *Property*

(a) The Meaning of Property

The term "property", from both a legal and an economic standpoint, denotes in its simplest meaning

¹ Har, *Social Laws* (1930), 54, 242.

² Pearl, *Studies in Human Biology* (1924), 585. For a criticism of Pearl's law see Wolfe, Is there a Biological Law of Human Population Growth? 41 *Quarterly Journal of Economics* (1924), 557.

the external objects of the world which are subject to ownership. When I say "my property is on the water front," I mean that the land which I possess is on the water front. But the term property has other meanings which are more generally employed and are more useful, and it would seem from the point of view of both legal and economic analysis that the use of the term property to denote external objects is misleading and should be abandoned. It is the meaning denoted by the term property in the statement, "The land on the water front is my property" that is the concern of law and economics. When I say "the land on the water front is my property," I am saying that with respect to the land on the water front I have a claim against other individuals that they keep away from it. Thus, basically, property involves a relation. Now both property and relation are exceedingly difficult to define, but it is possible to indicate what is meant when it is said that the essence of property is a relation. Qualities and relations are the characteristics which enable us to distinguish one object from another. When we say that "A is red" we are saying that the quality of being red is a characteristic A possesses without reference to other objects. Redness is thus a quality of A. But a relation is a characteristic that belongs to A when considered with reference to some other object, as in the phrase "A is the wife of B." Thus an object has a relation only when it is considered with reference to another object. Philosophers have been generally concerned with dyadic relations, that is, with relations of two terms, such as the relation of a *father*, a *husband*, or an *equal*. But as Royce² pointed out, there are countless relations which are triadic, tetradic,—

² Principles of Logic, 1 *Encyclopadia of the Philosophical Sciences* (1913), 97.

polyadic; and that the *debtor*-relation (*creditor, debtor, debt, consideration*) is in general a tetradic relation: A owes B, to C, for D. The fundamental idea of the common law is, as Pound¹ has shown, relation, not will. The Roman lawyer saw all transactions in terms of the will of an actor, but the common-law lawyer sees nearly all problems in terms of a relation—landlord and tenant, not the contract of letting; principal and agent, not contract of mandate; principal and surety, not contract of suretyship. Most legal relations are triadic or tetradic. The property relation is triadic: "A owns B against C," where C represents all other individuals; if it is expressed in the form "A owns B" it does not convey, except by implication, the conception of a relation between individuals, which is the essence of legal theory. From the point of view of logic there is a relation between the owner and the object, but in legal theory relations can only exist between individuals and not between an individual and an object or between two objects. A relation is reciprocal and in legal theory objects do not possess interests.

Not all relations, of course, are legal relations but, in advanced societies, for relations to rest upon ultimate social force, they must amount to legal relations, that is, they must be relations the incidences of which are secured by law. When I assert a claim against other individuals that they keep away from my land I am asserting a claim which, if it is to be effective, must be a legal one. But this does not mean that individuals in undeveloped communities possess no claims, or no property, although law, as it is known in advanced communities, may be non-existent, and although the

¹ *Interpretations of Legal History* (1923), 58.

community may not exhibit characteristics which are seemingly necessary to constitute a political state. In the most primitive communities, comprising thirty or thirty-five individuals, the members possess property. An individual has a claim against the other individuals of the community that they shall stay away from his betel pouch. If another individual does not stay away from the betel pouch but appropriates it to his own use without the consent of the first individual, the right of the first individual is maintained, either by the force of the whole community or by that of himself and his relatives. The claim is none the less a claim because it is maintained by the force of an individual. If an individual, in maintaining his claim, kills or injures the thief, he does it, if no retribution is visited upon him, with the sanction of the community; the force of the individual is thus ultimately the force of the community. Only so far as the claim is backed by force is it a claim in any meaningful sense. Property as a relation thus exists before the state, as Locke believed, though not, of course, for the reasons he gave.

No formal, comprehensive definition of property is possible but, as stated by the American Law Institute,^{*} in its broadest sense it denotes, "any interest or aggregate of interests". It is in this sense that "liberty of contract" is regarded as "property" in decisions

^{*} *Restatement of the Law of Property* (1929), Chapter I, Introductory Note. "The Property-Right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing," writes Professor Wigmore (2 *Select Cases on the Law of Torts* (1912), 858). "Its most absolute form amounts to no other than that. The common mode of definition, therefore, as a right of use by the owner himself, is fallacious. Take away the right, and the owner would and could be using it himself, just as well as with the right, unless we add the notion that others are not to interfere or compete in such use, and then that is seen to be the only essential element. Moreover, an owner need not actually make any use of the thing owned. Thus, the exclusion of other persons is the essence of the right." (The italics are Professor Wigmore's)

construing the Fourteenth Amendment to the Constitution of the United States. Narrower denotations are "any interest or aggregate of interests which are of a kind that normally have an economic value" and "interests with respect to a thing".

While it is important to have a clear understanding of the nature of property, the central issue is not its definition but its justification and the determination of its proper distribution in society. Institutions are not, like beauty, their own excuse for being, and it is necessary to inquire, in order to enable us to deal with them wisely, whether or not their foundations are rational ones or ones that are ethically permissible. Many theories have been advanced in attempts to justify the institution of property and a few of them have an important place in the history of social thought. They have contributed in varying degrees to the development of the current legal and economic conceptions of property and it will be necessary to review them briefly before considering the status of property in present-day legal and economic thought.

(b) The Occupation Theory

From the Roman jurists until recent times the act of taking occupancy of things which are without an owner with the intention of making them one's own property, has been regarded as the principal method by which title was originally acquired. The theory attained perhaps its most generalized expression in Kant's Principle of External Acquisition: "Whatever I bring under my power according to the Law of External Freedom, of which as an object of my free activity of Will I have the capability of making use according to the postulate of the Practical Reason, and which I will to

become mine in conformity with the Idea of a possible united common Will, is mine."¹ So plausible, indeed, is the idea that one is entitled to take possession of what one discovers, that it has been suggested that the practice is in accord with a fundamental human instinct.² This view is supported by the fact that occupation is one of the chief methods by which primitive peoples acquire property. "The principle of occupation is illustrated by innumerable facts from all quarters of the world," writes Westermarck.³ "By the hunter's right to the game which he has killed or captured; by the nomad's or settler's right to the previously unoccupied place where he has pitched his tent or built his dwelling; by the agriculturist's right to the land of which he has taken possession by cultivating the soil; by a tribe's or community's right to the territory which it has occupied." Among some peoples the principle of occupation was extended to such lengths that the owner of a lost article had no right to it if it were found by someone else. The Kaffirs⁴ "are not bound by their law to give up anything they may have found, which has been lost by someone else. The loser should have taken better care of his property, is their moral theory." And Mr Beaglehole,⁵ in what is the most adequate study

¹ Kant, *Philosophy of Law* (trans. Hastie 1887), 82.

² Pound, *Introduction to the Philosophy of Law* (1922), 195.

³ 1 Westermarck, *Origin and Development of the Moral Ideas* (2nd ed. 1917), 35-6. "Now the recognition of individual property in personal belongings and of communal property in land and its produce", adds Hobhouse, "may both be explained as resting on one and the same principle—the principle of occupation and use" 1 *Morals in Evolution* (1906), 332.

⁴ Lealie, *Among the Zulus and Amatongas* (1875), 202. Quoted, Westermarck, op. cit. supra note 3 at 37.

⁵ *Property* (1931), 315. Cf. 2 Kent, *Comm.* *318. "The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigour and maturity among polished nations, forms a very instructive portion in the history of civil society."

of property from the standpoint of psychology that we possess, concludes that the "study of property interests in man emphasizes the fact that these are more than the resultant of a blind instinct to keep that which satisfies fundamental needs. With the operation of intelligence the various impulsive factors directed toward the acquisition of some property object are ordered, through permanent association, into a relatively stable sentiment. Sentiment is connected with sentiment just as one property value involves another. The development of self-consciousness is materially assisted by the integration of those sentiments about property values made permanent through their incorporation within the orbit of the self's activity. One may no longer conceive of property as we did among the lower animals simply in terms of the end-object satisfying basic need. The self has developed sentiments of possession and of ownership centred about primitive property values and the acquired values assimilated to these. Animistic identification of the self with this property strengthens to a further degree this personality-property sentiment relationship." But even if it is possible to place a social custom upon a physiological or psychological basis it does not follow that the custom is thereby justified. Not all human tendencies are ethically self-evident, as the social theory of the Catholic Fathers should have taught us.

The principle of occupation best explains the acquisition of property among primitive peoples but to an inquirer concerned with the place of property in advanced communities it suffers from three serious limitations. (1) As a matter of fact, title to but few things in advanced societies is acquired by discovery or occupation. The rare instances in which the theory is

applicable are so negligible that this point alone makes the principle of extremely minor importance. (2) Kant's is perhaps the most notable attempt to deduce from the occupation principle the right of the owner to dispose of things to which he has acquired title. But such attempts are not convincing ; it is a serious defect of the principle that it cannot be extended to cover this important aspect of property. (3) But the fatal defect of the theory is that it does not meet the chief point : in no way does the theory justify or explain the necessity of property. This is the first point that must be settled in any theory of property and it is this point that the occupation principle ignores.

Long ago, Maine¹ brought an acute criticism against the principle, which is also of value in impliedly revealing the element of social worth which it contains. The true basis of the principle, Maine pointed out, was not an instinctive bias towards the institution of property, " but a presumption, arising out of the long continuance of that institution, that everything ought to have an owner. . . . The occupant, in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing." In communities where property is recognized, it seems a useful principle that everything subject to ownership should have an owner and that where possession is taken of a " *res nullius* " (i.e. of an object not reduced to possession by someone else) the occupant is the person who should be invested with the property claim, that is, that the possession of the occupant should be protected. We thus come round to the

¹ *Ancient Law* (1st Amer. ed. 1864), 249.

question which perplexed the minds of jurists and philosophers in the nineteenth century, Why does the law protect possession?¹ The answers to this question are various but it would seem that they are all reducible to one: that it has been found that it leads to a better ordering of society if possession is protected. Possession was originally protected in order to aid the law of crime and tort; it came at length to be protected in order to aid the law of property.²

(c) The Labour Theory

The principle that when an individual incorporates his labour into an object it thereby becomes his property was, like the occupation theory, first advanced by the Roman jurists of the classical period.³ Indeed, sixty-five years before Locke's elaboration of the principle, Grotius⁴ had shown that it could be reduced to the occupation principle: "Now as nothing can naturally be produced, except from some materials before in existence, it follows that, if those materials were our own, the possession of them under any new shape, or commodity, is only a continuation of our former property ;

¹ Cf. Holmes, *The Common Law* (1881), 206.

² 3 Holdsworth, *Hist. E. L.* (3rd ed. 1923), 95, 7 *ibid.*, 465; 2 Pollock and Maitland, *Hist. E. L.* (1895), 40. Cf. Pollock, *First Book of Jurisprudence* (1896), 162-3 for the justification of the protection of possession from the social point of view. Cf. 1 Bentham, *Works* (1843), 327.

³ Girard, *Manuel élémentaire de droit romain* (1901), 316; Pound, *op. cit. supra* p. 62, note 2 at 196. The principle was also advanced in the Middle Ages by John of Paris. Cf. Larkin, *Property in the Eighteenth Century* (1930), 7. Locke states the principle thus "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men." *Two Treatises of Government*, 4 *Works* (1824), 353-4.

⁴ *Law of War and Peace* (Trans. Campbell, 1901) Chapter III, § 1.

if they belonged to no one, our possession comes under the class of title by occupancy : but if they were another's, no improvement of ours can by the law of nature give us a right of property therein." It has been argued by Westermarck¹ that Grotius's reduction of the labour principle to the occupation theory is unsound, as the ownership of the products of mental labour can hardly be considered to be due to occupation. But the labour theory that Grotius was dealing with, including even its later elaboration by Locke, did not contemplate the creation of a new object which heretofore had had no existence, but the creation of a new object from two or more previously existing objects. Furthermore, it would not seem to be extravagant to consider the title to products of mental labour to be determined by the occupation principle, for it was by this principle that Blackstone² regarded title to such products to be determined. The truth is that in their historic forms neither the occupation nor the labour principle is applicable to mental creations and it is only by a distortion of one or the other or both that mental creations can be brought under them and here it would seem that the labour principle would be the more applicable.

¹ 2 Westermarck, op. cit. supra p. 62, note 3 at 41.

² 2 *Bl. Comm.* * 405. This was of course an extension of the Roman *occupatio*. 7 Holdsworth, *Hist. E. L.*, 480. In *Baker v. Libbe*, 210 Mass. 599, 97 N. E. 109 (1912), Chief Justice Rugg held that the plaintiff as executor of the will of Mary Baker Eddy could restrain the publication of certain autographed letters of the testatrix upon the authority of the labour principle. "It is generally recognized that one has a right to the fruits of his labour," he held. "This is equally true, whether the work be muscular or mental or both combined. Property in literary productions, before publication and while they rest in manuscript, is as plain as property in the game of the hunter or in the grain of the husbandman. The labour of composing letters for private and familiar correspondence may be trifling, or it may be severe, but it is none the less the result of an expenditure of thought and of time. . . . The basic principle on which the right of the author is sustained even as to writings confessedly literature is not their literary quality, but the fact that they are the product of labour."

But the labour theory, as also the occupation theory, is not immune from criticism. It too is not a justification of property but assumes a system of property already obtaining. A more important criticism can be directed at the fact that Locke reasoned from a "state of nature" in which each workman was the independent creator of his own products. This is the golden condition of society of which most Utopians dream, but to-day even the most revolutionary change in our economic structure could not make it an actuality. The production of wealth is, and must remain, whenever the population increases beyond the barest minimum, a co-operative process. Locke¹ himself concluded that "it would be almost impossible—at least, too long—to reckon up" the number of workmen and things involved in the production of a loaf of bread. What part of the value of the bread are we to assign to the ploughman, the reaper, the baker or the numerous other persons who mixed their labour with nature before the loaf was finally produced? Finally, by no principle of logic is it possible to show that the occupation or the labour principle should confer title to property. It does not follow, because an individual finds a precious stone in the wilds or fashions a chair out of wood which he has gathered, that necessarily he should have title to the stone or the chair. Strong psychological or ethical grounds can be advanced for such a claim, but it cannot be established deductively.

The obvious fallacies of the theory, however, do not entirely invalidate it. It is easy to pick at the bones of the theory and ignore the rich meat which surrounds

¹ *Ibid.*, op. cit. supra p. 65, note 3 at 45 Cf. Ritchie, *Natural Rights* (1924), Chapter XIII.

them. So shrewd a critic as Hallam¹ ranked Locke's theory of property with his most notable accomplishments, while to Macculloch and Marx it suggested the labour theory of value.² Among primitive peoples it plays as important a role in the acquisition of property as does the occupation principle.³

Labour, according to the law texts of the ancient Hindus,⁴ was one of the recognized modes of acquiring title to property. Among the Ifugaos⁵ of Luzon the owner of the crops is not the individual on whose land they are raised, but the person who cultivates them. This is a widely recognized rule among primitive peoples. Furthermore, in the beginnings of English law, we see an example of it in what are known as Lammas meadows—i.e. meadows divided into strips subject to individual ownership while the crop is growing, but common to the township after the crop has been gathered in.⁶ The rule leads directly to the economic tenet that the products of labour should be distributed so as to secure a maximum of production. This tenet rests upon Malthus's demonstration that the danger is not that the products of labour may be badly distributed, as the reformers of the early nineteenth century feared, but that labour may not produce enough.⁷ "If I despair of enjoying the fruits of

¹ 4 Hallam, *Introduction to the Literature of Europe* (1855), 203.

² Lindsay, *Karl Marx's Capital* (1925), 60.

³ 1 Hobhouse, op. cit. supra p. 62, note 3 at 332. Cf. 2 Westermarck, op. cit. supra p. 62, note 3 at 42, Hartland, *Primitive Law* (1924), 102, Vinogradoff, *Custom and Right* (1925), 73.

⁴ 2 *Sacred Books of the East* (1879), 229, Gautama, *Institutes of the Sacred Law*, X, 42, 25 *ibid.* (1886), 426, *Laws of Manu*, X, 115.

⁵ Barton, Ifugao Law, 15 *Univ. Cal. Pub. Amer. Arch. and Ethn.* (1919), 39 et seq.

⁶ 2 Holdsworth, *Hist. E. L.*, 57.

⁷ 2 Malthus, *Essay on Principle of Population* (1st Amer. ed. 1809), 105-13. Cf. Halévy, *Growth of Philosophic Radicalism* (1928), 224.

my labour", wrote Bentham,¹ "I shall only think of living from day to day: I shall not undertake labours which will only benefit my enemies." The recognition of the labour theory of property leads to the encouragement of labour and it is for this reason that it is still an important principle in present-day social thought.

(d) The Hegelian Principle

Property is the external sphere in which the free personality of the individual is realized. An individual, who is an end in himself, may appropriate things, which are means but not ends, for the satisfaction of his own wants. "Every man . . . has the right to put his will into things, that is to annul them and make them his own", writes Hegel.² "For they as external, have no self-aim. . . . Only the will is infinite, absolute in reference to all else, which in turn is only relative. To make such things mine is really only to manifest the dignity of my will in comparison with them, and to demonstrate that they are not independent and do not have any self-end." As the will of a particular individual becomes personal in property it is essential that property have the definite character of being his in particular.³ This is the Hegelian justification of private property.

The principle that property is the realization of freedom has attracted many adherents, and various attempts have been made to improve upon Hegel's unsatisfactory exposition.⁴ The most successful of these

¹ 1 Bentham, *Works*, 310 Bentham is here only repeating Locke's argument. Locke, *Civil Government*, § 42

² Hegel, *Grundlinien der Philosophie des Rechts* (1883), § 44 Supplement. (Eng. trans. Sterrett, *The Ethics of Hegel* (1893), 77)

³ *Ibid.*, § 46.

⁴ Cf 2 Ely, *Property and Contract in their Relations to the Distribution of Wealth* (1914), 536, Pound, *Introduction to Philosophy of Law* (1922), 214-19

in recent times has been that of T. H. Green who conceived of appropriation as an expression of will: "of the individual's effort to give reality to a conception of his own good"; and of property as "the constant apparatus through which he gives reality to his ideas and wishes."¹ But Green was not able to extend the principle beyond a general consideration of the rights and duties of classes and individuals in relation to the common good, and it is in this difficulty, aside from the meta-physical complications involved in the concept of "will", that the weakness of the principle lies. Green recognized that the distribution of property as it obtains in present-day society, as for example the fact that great numbers "cannot have it in that sense in which alone it is of value, viz. as a permanent apparatus for carrying out a plan of life",² was very far from meeting the ideal which he proposed. Faced with the difficulty of applying the principle to actual conditions he could only make the suggestion, which does not carry us very far, that the rationale of the principle required society to bestow upon everyone who conformed to the positive condition of possessing property (labour and respect for the property of others), such property as would enable him to develop a sense of responsibility.³

In a world in which the quantity of external objects is sufficient to meet the demands of everyone, it is possible to conceive of the successful application of the Hegelian principle; but when, for practical purposes, all external objects have been appropriated it is impossible to deduce from the principle the manner in which they should be distributed and the conditions under which

¹ Green, *Principles of Political Obligation* (1895), § 213 and § 214.

² *Ibid.*, § 220.

³ *Ibid.*, § 221.

they should be owned. But the virtue of the principle lies, however, in showing us that the idea of property as such is not inconsistent with a highly developed ethical point of view.

(e) Legal and Economic Theories

Historically, the occupation, labour and personality theories are the three most significant theories of property which have been developed and all three have played important roles in the formulation of the legal and economic principles of property. But the legal theory of property, which was developed during the first half of the nineteenth century, and the present-day economic theory of property, are, though they have a common origin, worlds apart. Our purpose now is to inquire whether or not the economic conception of property has anything to contribute to the enlargement of the legal conception.

A theory developed by Hobbes,¹ Montesquieu² and Bentham³ has been termed the legal theory of property,⁴

¹ Hobbes, *Leviathan* (1651), 91.

² Montesquieu, *Spirit of Laws* (1823), Book 26, Chapter XV, 153.

³ 1 Bentham, *Works*, 308

⁴ 2 Ely, *Property and Contract*, 544 Dean Pound has, in his *Jural Postulate* II, advanced what also might be termed a legal theory of property "In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order." *Outlines of Lectures on Jurisprudence* (4th ed. 1928), 108. Although Dean Pound proposed his jural postulates as expressing the characteristic ideals of this civilization, rather than principles valid for all places and all times, Professor Hocking is of the opinion "that in these postulates the relative does in fact join hands with the permanent". *Philosophy of Law and of Rights* (1926), 93 There is little question, however, that Dean Pound's position is the sounder, and that Professor Hocking is guilty of the same offence committed by Hegel when he identified the Prussian State with the final objective of society. The Postulate should in fact read "In our type of civilized society . . . for it is quite possible to imagine a society to which the description "civilized" could not be denied, in which the conditions of the postulate would be irrelevant; furthermore, insofar as the postulate gives expression to the occupation and labour theories it is subject to the limitations of those theories.

and, though it has had little influence, it deserves a brief discussion. This theory asserts that property is the creation of law and that, in the absence of law, there is no property. "Property and law are born, and must die together", wrote Bentham, who has given the most adequate statement of the theory. "Before the laws, there was no property: take away the laws, all property ceases."¹ Now it is plain that this theory depends for its meaning upon the definition of the word "law". There is no escape from the fact that according to the theory wherever property exists law exists also; and as property is recognized in even the rudest communities, we are forced to conclude that law also exists in such communities. It is perhaps true that law as we know it exists in primitive communities though it is apparently impossible to define the term so that the definition is applicable to both primitive and advanced societies.² But to assert that wherever property is recognized law exists is to rob the term "law" of all significance. Thus, Bentham reduces the word "law" to such simple terms that it is indistinguishable from custom. "Suppose . . . the slightest agreement among . . . savages reciprocally to respect each other's booty; this is the introduction of a principle to which you can only give the name of law."³ Thus the so-called legal theory of property if it is followed to its conclusion becomes meaningless; to possess value, a more positive conception of the term "law" would have to be developed than that attached to it by the adherents of the theory.

But the courts have developed a theory of property which is perhaps more properly describable as legal. This is the natural or "higher" law theory according to

¹ *Supra* p. 72, note 3.

² *Supra*, p. 18.

³ *Supra* p. 72, note 3.

which property is a natural right, superior to all human laws, which in fact merely discover and declare it, and which owes its existence to its own merit and its conformity to the fundamental principles of justice. The doctrine of natural rights goes back to the Greeks and the Romans and was widely held in the Middle Ages. Its infiltration into Anglo-American law was partly due to its acceptance by Coke and Blackstone, but above all it was due to the writings of Locke who rationalized the doctrine by basing it upon the social compact and its handmaiden the State of Nature.¹ Occasionally other theories have been advanced, as for example the personality principle² and Bentham's idea that property is the creation of law. "The foundation of property is not in philosophic or scientific speculations, nor even in the suggestions of benevolence or philanthropy", declared the New York Court of Appeals in 1856. "It is a simple and intelligible proposition, admitting, in the nature of the case, of no qualification, that that is property which the law of the land recognizes as such. It is, in short, an institution of law, and not a result of speculation in science, in morals or economy."³ But the decided weight of authority supports the natural law theory which has perhaps been most clearly stated by the Iowa

¹ Corwin, *The "Higher Law" Background of American Constitutional Law* (1928), 42 *Harv. L. R.*, 149; Grant, *The Natural Law Background of Due Process* (1931), 31 *Col. L. Rev.*, 56; *Idem*, *The "Higher Law" Background of the Law of Eminent Domain* (1931), 6 *Wis. L. Rev.*, 67; Haines, *Reform of Natural Law Concepts* (1930); Pound, *Theory of Judicial Decision*, 34 *Harv. L. R.* (1923), 802; Haines, *Law of Nature*, 25 *Yale L. J.* (1916), 615.

² *Schafer v. Haller*, 108 Ohio St., 140 N. E., 517 (1923).

³ *Wynhamer v. The People*, 13 N. Y. 378 (1856). The theory expressly negating the natural law doctrine was repeated in 1911 in almost the identical words. "The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law." *Ives v. South Buffalo Ry. Co.*, 200 N. Y. 271, 94 N. E. 431 (1911).

Supreme Court. "The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same in their use, or the use of the public. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy."¹ This, in brief, is the theory of property as developed by the courts. The inadequacies, the defects, the unsoundness of the traditional natural law theory need hardly be set forth at this late date.² Our inquiry is whether or not economics, one of the basic concepts of which is property, has a more satisfactory theory to suggest as a substitute for the natural law theory.

Property, according to the classical economic theory, encourages a maximum of productivity, and this, wrote John Stuart Mill,³ "is the best reason that can be given" for its justification. But there has been developed not only by economists but by political scientists and a few

¹ *Henry v. Dubuque & Pacific R. R. Co.*, 10 Iowa 340 (1860), *Calder v. Bull*, 3 Dall 386 (1798), *Van Horne's Lessee v. Dorrance*, 2 Dall. 304 (1795), *Wilkinson v. Leland*, 2 Pet. 627 (1829), *Savings and Loan Assoc. v. Topeka*, 20 Wall, 655 (1875), *Arkansas State Co. v. State*, 94 Ark 27, 125 S. W. 1001 (1910), *University of Maryland v. Williams*, 9 Gill & J. 365 (Md. 1838), *Atchison & Nebraska R. R. Co. v. Baty*, 6 Neb 37 (1877), *Re Boyce*, 27 Nev. 299, 79 Pac. 1 (1904), *Taylor v. Porter*, 4 Hill 140 (N. Y. 1843), *Hoke v. Henderson*, 15 N. C. 1 (1833), *Dibrell v. Morris' Heirs*, 89 Tenn. 497, 15 S. W. 87 (1891); Cf. Farrand, *Records of the Federal Convention of 1787* (1911), I, 553-4, 541-2, II, 123.

² For a critical discussion of the subject see Ritchie, *Natural Rights* (1924). Professor Morris Cohen, in a valuable study to which this discussion is much indebted, states that he is a believer in natural rights. Property and Sovereignty (1927), 13 *Corn. L. Q.*, 8. Few, however, would quarrel with Professor Cohen's conception of natural rights, which is hardly the traditional one, or his efforts to approach the formulation of a theory of natural rights from the standpoint of the requirements of a scientific theory. Cf. *Reason and Nature* (1931), 413.

³ Quoted, Laveleye, *Primitive Property* (1878), 347. Cf. 1 Ely, *Property and Contract*, 70.

jurists as well, a conception of property based upon its social utility. This is the distinction between property for use and property for power, or, as it is now termed, the functional theory of property.¹ The essence of this theory is that property which involves the discharge of definite personal obligations, which fulfils a social purpose, is morally justifiable and that property which is passive, which is merely a claim on wealth produced by another's labour is morally unjustifiable. Mr Tawney has drawn up a rough classification of property rights based upon this difference.

1. Property in payments made for personal services.
2. Property in personal possessions necessary to health and comfort.
3. Property in lands and tools used by their owners.
4. Property in copyright and patent rights owned by authors and inventors.
5. Property in pure interest, including much agricultural rent.
6. Property in profits of luck and good fortune ; "quasi-rents".
7. Property in monopoly profits.
8. Property in urban ground rent.
9. Property in royalties.

"The first four kinds of property obviously accompany, and in some sense condition, the performance of work", writes Mr Tawney.² "The last four obviously

¹ Tawney, *The Acquisitive Society* (1920), Chapter V, Duguit, *Les transformations générales du droit privé* (2nd ed. 1920). Translated as Chapter III of *Progress of Continental Law in the 19th Century* (1918), 129. Ely, *Property and Contract* (1914); Laski, *A Grammar of Politics* (1925), Chapter V. Hobhouse, *Historical Evolution of Property in Property, its Duties and Rights* (1922), Lindsay, *Principle of Private Property*, *Ibid.*

² Tawney, *The Acquisitive Society*, 64.

do not. Pure interest has some affinities with both. . . . The crucial question for any society is, under which each [*one* ?] of these two broad groups of categories the greater part (measured in value) of the proprietary rights which it maintains are at any given moment to be found. If they fall in the first group creative work will be encouraged and idleness will be depressed ; if they fall in the second, the result will be the reverse."

The roots of this doctrine lie in the rich field of medieval thought and reach down to Aristotle. From the standpoint of the functional theory, the justification of property rests in the fact that property, when wisely used, is for society a necessary condition of its health and efficiency and of its continued existence. This was the argument of Aquinas. The Fathers, particularly Basil and Ambrose, had, contrary to the Anglo-American legal theory, dogmatically contended that private property was opposed to natural law because all things had been given to men in common. Aquinas stated their arguments with characteristic fairness and neatness and refuted them by showing that the establishment of private property is due not to natural law but to positive law or human agreement and that it is not therefore contrary to natural law but is added to it by human reason. But Aquinas did not stop here. He wisely saw that merely because it was lawful to possess property it did not follow that property was necessary. His argument is the first complete justification of property and was adopted *in extenso* by those who followed him ; and it was never improved upon. Property "is necessary to human life for three reasons", he wrote.¹

¹ *Summa Theologiae*, 2, 2, 66, 2. (Translated by the Fathers of the English Dominican Province, 1918)

"First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labour and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is insured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed." Although Aquinas does not mention Aristotle, it is almost certain that the discussion of property in the *Politics*¹ was the foundation of his argument.²

We are now brought to the point of our inquiry: Is the functional theory of property a sounder and more useful theory, from the standpoint of legal thinking, than the traditional natural law theory? We saw at the outset that there were two basic problems of property: (a) the establishment of a theory of property in accordance with which it would be ethically possible to justify private property; and (b) the establishment of a principle from which it would be possible to deduce the proper distribution of wealth. We have seen in the occupation theory, the labour theory and the personality principle, the important historic attempts, and their limitations and merits, to meet one or the other or both of these problems. To what extent does the functional theory overcome the

¹ *Politics*, ii., 5.

² J. Carlyle, *Medieval Political Theory in the West* (1928), 18.

traditional difficulties that stand in the way of successful solution of the problems ?

It may be said at once that the functional theory has little to offer towards the solution of the second problem, the determination of the principle in accordance with which wealth should be distributed. From the standpoint of the law it is, however, no weakness in the theory that it is addressed solely to the question of the justification of property. The determination of the principle in accordance with which wealth should be distributed lies within the province of the law as well as within the province of economics, political theory and ethics ; but it is a problem the solution of which, from a practical standpoint, is a task that belongs to the future.

At first sight it would seem that the functional justification of property is too simple, that mankind's search through the centuries for the rational basis of property should lead to a grander and more difficult concept than that which Maitland¹ would term a principle of mere expediency. But if there is one thing the history of ideas of property has taught us it is that there is little likelihood that an *a priori* principle will ever solve our difficulties. "The justification of property", writes Rashdall,² "must depend not upon any *a priori* principle but upon its social effect", and it is upon this basis that the functional theory defends certain forms of property. The simplicity and directness of the functional standard, which increases its ease of application, is indeed one of its merits.

To the law the functional theory has two contributions to make. It offers, first, a rational justification of

¹ Cf. 1 Maitland, *Collected Papers* (1911), 283

² *Philosophical Theory of Property in Property, Its Duties and Rights*, 68.

a primary legal institution in place of the untenable theory by which the courts have attempted to justify it. The functional theory rests its justification of property not perhaps upon the only tenable ground but at least upon a ground that is ethically sound. Secondly, it offers a standard for discriminating between those forms of property which should be encouraged and those which should not. Long ago, when limitations upon property became necessary, legal thinking freed itself from the absolutism of natural rights, and the functional theory is not needed as a liberating agent.¹ Property is constantly being confiscated without compensation on the ground that it promotes the health, safety, morals and general welfare of the people. The abolition of slavery, the enactment of the prohibition law, which deprived brewers and saloon-keepers of millions of dollars of property, prohibited "uses" under zoning laws, the destruction of property infested with pests injurious to plants and fruits, the abolition of private office, the forbidding of employment of miners for more than eight hours a day, and the enactment of a law prohibiting a street car passenger to sell his transfer, are common examples. The functional theory enables us, at least as a beginning, to discriminate between types of property, so that we may encourage those which are ethically legitimate and discourage those which are not.

2. *Contract*

Fidelity to promises among primitive peoples is a duty which, within certain limits, is of such general recognition that it can be regarded as a characteristic of

¹ "The idea of absolutism in the use and enjoyment of our property has long since been exploded." *O'Bryan v. Highland Apartment Co.*, 128 Ky., 282, 108 S. W. 257 (1908).

this stage of social life. Among most primitive tribes nothing can induce the members to break any agreement, however informal, which is entered into.¹ Among the Zulus, for example, it is remarked that "in matter of trust—often tacit—fidelity is shown amongst themselves which would be remarkable where written contracts were in force."² And this is true, with few exceptions, of most uncivilized peoples. This honesty even extends in some cases to individuals who are not members of the tribe, and traders can, with safety, allow the fullest credit, although it would be a mark of superior resourcefulness to obtain the goods from traders by stealth if the opportunity presented itself. Occasionally members of a tribe display a greater honesty in dealing with outsiders than with their fellow members. The Eskimo of Bering Strait, for example, can be trusted to pay in full any debt incurred to a white man but will rarely return any object borrowed from a member of the tribe. The lender is by custom prohibited from asking for its return and does not hold the borrower to account for failure to return it. If he can lend it, the borrower reasons, he has more than he needs and there is thus no necessity to return it.³ The basis for the requirement that promises be kept and that agreements be carried out in good faith seems to lie principally in the fact that deception is seldom if ever practised for its own sake but with the expectation of the deceiver benefiting himself

¹ & Westermarck, *Moral Ideas*, Chapters XXX-I, & Briffault, *The Mothers* (1927), 104, 123. Westermarck, with his customary thoroughness, can be counted upon to have collected most of the examples.

² *The Natives of South Africa, their Economic and Social Condition*. Ed. by the South African Native Races Committee (1901), 37. Quoted & Briffault, *The Mothers*, 104.

³ Nelson, *The Eskimo about Bering Strait*, *Eighteenth Annual Report of the Bureau of Ethnology* (1899), Part I, 204.

at the expense of the person deceived.¹ Jhering's² suggestion that man was originally a liar and that veracity is the result of progress is not, as Westermarck has shown, consistent with facts. "Language was not invented", writes Westermarck,³ "to disguise the truth but to express it." It is sometimes supposed that animals exhibit deceitfulness, but cautious students regard the examples as a piece of the observers' inferences and not as evidencing motives of fraud on the animals' part.⁴

Promises and agreements are an important feature of all forms of social organization. In all social orders a considerable portion of every individual's wealth is made up of what another individual has promised to bestow upon or do for him in the future. Thus, throughout all societies, promises have a vital economic significance. But although the essence of a contract is a promise, not all promises, as individuals, to their sorrow, are sometimes told by the courts, are contracts. "To say that agreements and promises have existed in a remote antiquity is one thing", writes Holdsworth.⁵ "To say that such agreements were enforceable at law—were contracts—is quite another." A brief consideration of the function and nature of promises in social orders different in form from that in which Anglo-American and Continental legal concepts prevail may perhaps throw some light upon this attempted distinction and upon the foundations of contract in general.

¹ 2 Westermarck, *op. cit. supra* p. 80, note 1 at 111.

² 2 *Zweck im Recht* (1877), 606.

³ *Op. cit. supra* p. 80, note 1 at 125.

⁴ Lloyd Morgan, *Animal Life and Intelligence* (1890), 401, see also Hobbhouse, *Mind in Evolution* (1926), 314.

⁵ 2 Holdsworth, *Hist. E. L.* 82.

Contract, from the legal and economic standpoint, is to-day commonly conceived of as a function of a credit economy; that is, it is assumed, following Hildebrand's¹ well-known classification, that society, meaning the civilization of the West, has passed through three stages of economic development—barter, money and credit—that a credit economy is founded upon security of promise and, therefore, contract is in this stage more fully developed than in the two preceding stages, in which it exists, if at all, in only a rudimentary form. This view is one of great plausibility, and no doubt contains many elements of truth, but it is based upon a classificatory scheme of social evolution against which much criticism can be levelled.² There is no doubt that social development or social evolution, if we employ the term in a very loose sense, has occurred in all social orders. All societies have a history and it is an important, as well as the most difficult, problem confronting the social historian to mark off the developmental stages of each social order. But the solution of the problem is, in the present state of our knowledge, an impossibility. The evolutionary schemes which have been advanced do not represent an historical reality and are usually contrary to fact. Also it is impossible to demonstrate that the

¹ Hildebrand, *Natural-geld-und Creditwirtschaft*, 2 *Jahrbücher für National-ökonomie und Statistik* (1864), 1.

² For the modern attitude towards the conception of stages of social development see Goldenweiser, *Early Civilization* (1929), 20, 125, 301, Malinowski, *Social Anthropology*, *Encyclopædia Britannica* (14th ed., 1929); Leroy, *Essai d'Introduction Critique à l'étude de l'économie primitive* (1925), passim; Firth, *Primitive Economics of the New Zealand Maori* (1929), Chapter I and passim; Koppers, *Die Anfänge des Menschlichen Gemeinschaftslebens* (1921), Dobb, *Capitalist Enterprise and Social Progress* (1925), 9. Professor Ginsberg has examined the question carefully and concludes that the conception of stages of growth is still necessary and useful and that it may be defended against the objections which have been raised against it. He does not believe, however, that we have enough information at our disposal at present to be committed to any particular theory of social or progressive evolution. *Studies in Sociology* (1932), 88.

stages of development may not be evolutionary but devolutionary. Bücher¹ for example, as a further refinement of Hildebrand's scheme, proposes four early stages of development: gift economy, gift barter economy, pure barter, and money barter. But it is equally plausible to maintain that gift economy developed from barter economy as to maintain the reverse. Indeed, as Dr Firth² has shown, this is precisely what Müller-Lyer does. Bücher³ regards the customs of the Indians of British Guiana as indicating a transition from gift making to exchange. Müller-Lyer,⁴ however, cites the same people in his argument as an instance of transition from exchange to gift making. But the real point of the criticism against the attempt to classify cultures on the basis of types of economy is that at this stage of our knowledge we do not possess enough information to enable us to set up criteria of sufficient comprehensiveness. Only a handful of cultures have been adequately studied from the economic standpoint and until the economic organization of many more is known in detail it is a misleading task to generalize about stages of economic development.

In the present condition of our knowledge, the essential task of primitive economics is to make clear the role of economic institutions in different cultures, and to abandon, for the present at any rate, attempts at constructing chronological sequences. In this type of approach, the object is to see the economic institution in its relation to the social situation as a whole, to understand its function in society, and to correlate it with the

¹ *Industrial Evolution* (1901), Chapter II.

² *Op. cit. supra* p. 82, note 2 at 14-15.

³ *Op. cit. supra* note 1 at 64-5.

⁴ *History of Social Development* (1920), 160-1.

social forces to which it is akin. "The root of the matter lies in the fact that it is by consideration of what a thing *does* that one is likely to best understand what it *is*", writes Dr Firth,¹ in one of the ablest studies of primitive economics that we possess. In recent years, particularly under the stimulus of Professor Bronislaw Malinowski, a number of valuable studies along these lines have been made.² The data gathered together in these studies would seem to throw some light upon the nature and significance of contract.

As the essence of a contract is a promise, we are most interested in those economic aspects of a culture which have to do with business arrangements for future exchange. Among many primitive peoples who possess no money and are ignorant of its function, the exchange of gifts is a custom which is deeply rooted in their social organization.³ This custom sometimes takes an economic form in which the primary object is to obtain from the other party something of practical utility, and sometimes a ceremonial form, in which the transaction has a wider social import than the mere acquisition of goods. The Kula of the Trobriand Islanders is an example of this latter type. The Kula is a form of exchange carried on by communities inhabiting a wide ring of islands. Necklaces of red shell pass constantly along definite routes in a clockwise direction to the men who are in the Kula; in the opposite direction there

¹ Op. cit. supra p 82, note 2 at 25.

² Malinowski, *Argonauts of the Western Pacific* (1922), Idem., *Crime and Custom in Savage Society* (1926), Idem., *Primitive Economics of the Trobriand Islanders* (1921), 31 *Economic Journal*, 1, Idem., *Economic Aspect of the Intichiuma Ceremonies, Festschrift tillägnad Edward Westermarck* (1912), Radcliffe-Brown, *The Andaman Islanders* (1922), Thurnwald, *Die Gemeinde der Bönaro* (1921), Mauss, *Essai sur le don* (1923-4), 1 *L'année sociologique*, N.S., 50, Hoyt, *Primitive Trade* (1926), Firth, op. cit. supra p 82, note 2. See also Grierson, *The Silent Trade* (1903).

³ For the widespread extent of this custom see Hoyt, *Primitive Trade*, 97-106.

pass bracelets of white shell. Every article travelling in its own direction is exchanged for articles of the other class travelling in the opposite direction. The acts of the Kula are governed by an elaborate ritual.¹ The exchange of gifts, whether economic or ceremonial, which frequently takes the form of a present transaction, is not infrequently an arrangement which is to be completed in the future.² Thus Dr Firth³ writes :

It will have been observed that this system of reciprocity in gifts, even in its more purely economic aspect, often involved delayed repayment. A person received potted birds in their season, and returned the compliment by sending a present of fish when the due time came for catching them. In other words, the delay often incident on the seasonal production of different kinds of commodities represented a lag between acceptance and repayment. This was also the case with many other transactions, the donor of the gift being compelled to wait for a period until the return could be made. This amounted to a system of credit in exchange, embryonic perhaps in extent, but conceptually fully developed. Since one party made his present, waited and kept his account till the other should repay, this involved a definite trust in the fidelity of the debtor.

The system of gift exchange is founded upon the principle that for every gift received another of at least equal value should be returned. This principle of reciprocity is not confined to any one culture but has been observed as one of the basic social forces of a great many communities, in Melanesia,⁴ in Rossel Island,⁵ among the

¹ Malinowski, *Argonauts of the Western Pacific*, 81.

² Malinowski's statement that "payments are never deferred" among the Trobrianders (*Primitive Economics of the Trobriand Islanders*, 31 *Econ Jr.* 13) is hard to reconcile with his elaborate description of "deferred payments" in his *Argonauts of the Western Pacific*, 187.

³ *Primitive Economics of the New Zealand Maori*, 415. Dr Firth adds that "the second gift was often made larger than the first. This does not, however, correspond to any system of interest, since the increased return made by the first recipient is in no way a reward to the donor for 'waiting'. It is not the premium for delayed repayment which is the essence of true interest."

⁴ Malinowski, *Crime and Custom in Savage Society*, Chapter IV.

⁵ Armstrong, Rossel Island Money (1924), 34 *Economic Journal*, 423, *Idem.*, Rossel Island (1928), 59.

Banaro of New Guinea¹ and among the Orokaiva of Papua.² In Maori speech the term *utu* is used to denote this concept and Dr Firth suggests that it be adopted as a general descriptive label, following the examples of *mana* and *taboo*, words also of Oceanic origin.³ In the social orders in which the principle of reciprocity operates it is found that it permeates the entire social life and is not restricted merely to economic transactions. It is one of the dynamic forces of the community. If, for example, a member of another tribe is killed, the life of the slayer or of a relative is demanded as *utu*.

The efforts of students of primitive economics to account for the forces underlying the principle of reciprocity are comparable to the attempts of jurists and philosophers to formulate a satisfactory theory of enforcement of promises as a standard in contract. Mauss⁴ believes that the principle of reciprocity can be explained by the common idea of primitive people that when property is transferred, a portion of the donor's personality is transferred with it, thus giving the donor magical powers which would be exercised to the great moral, physical and spiritual damage of the donee unless repayment were made. Professor Radcliffe-Brown⁵ and Miss Hoyt⁶ account for the principle on the ground that it is an expression of goodwill. The donor has expressed his goodwill by making the gift, and only a repayment can express the similar sentiment of the donee.

¹ Thurnwald, *Die Gemeinde der Bânaro*, 10.

² Williams, *Orokaiva Society* (1930), 317

³ Op. cit. supra p. 82, note 2 at 415.

⁴ Op. cit. supra p. 84, note 2 at 49. Cf. Crawley, *Mystic Rose* (2nd ed. 1927), 293.

⁵ Op. cit. supra p. 84, note 2 at 237.

⁶ Op. cit. supra p. 84, note 2 at 105.

Dr Thurnwald¹ believes that it results from a variety of causes. He points out that it is often suggested by differences in natural surroundings, such as the contrast between the mountains and the coast lands. Thus the hill tribes provide the Makeo, who inhabit the southern coast of New Guinea, with feather ornaments, stone axe-heads and clubs, while the latter reciprocate with shell ornaments and fish. Professor Malinowski² thinks the principle is rooted in economic self-interest and social vanity. Dr Firth,³ although he presents his views with certain qualifications, regards the ideas of conciliation and self-protection as being the root elements of reciprocity: in society man must conciliate his fellows, compromise with them and make concessions to them; but he can pursue this policy only so far; his fellow men are no more altruistic than he is, himself, and he must therefore protect himself and insist on receiving his due.

In the absence of a system of law as it is known in more complex cultures, the positive sanctions which impel an individual to fulfil the obligations of his agreement are three⁴: (1) the possibility that, in the future, he might be deprived of the opportunity to trade; (2) the fear that his reputation and social prestige would suffer; and (3) the dread of witchcraft. Westermarck, as we have seen above, believes that the condemnation of bad faith is to be accounted for generally on the ground that he who breaks a promise usually

¹ *Economics in Primitive Communities* (1932), 146. "The idea of requital", Dr Thurnwald adds, "like that of remuneration, appears to be one of the original reactions of mankind. When applied to wrong inflicted, the result is the blood feud, and when applied to gifts, the reaction takes the form of exchange or the development of trade." *Ibid.*, 141.

² *Crime and Custom*, Chapters IV-V.

³ *Op. cit.* supra p. 82, note 2 at 421-6.

⁴ Firth, *op. cit.* supra p. 82, note 2 at 411, 2 Westermarck, *Moral Ideas*, 109-36.

commits an injury against another person, and that this act calls forth sympathetic resentment and becomes an object of moral censure. The positive sanctions just enumerated are, however, an expression of the principle of reciprocity—*adu*—which, as Malinowski¹ was the first to demonstrate, amounts in simpler cultures to a system of law as distinguished from a mere rule of custom.² This system of law, which as we saw governed all the phases of tribal life, consists of a body of binding obligations which is recognized as specifying rights of one party and duties of the other, “kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society.”³ The important point here is that the savage has law as well as custom and that it is law, in primitive communities, which enforces agreements.

Students of primitive economics have made it abundantly clear that agreements and arrangements for the future are an integral part of the social organization of many of the so-called simpler cultures and that these arrangements and agreements are enforced by means of compelling sanctions. For the legal thinker the important question is: Is it possible to distinguish in an adequate manner the agreements of the peoples of the simpler cultures from what are legally known as contracts or are these agreements in reality contracts? This is a question which would seem, for the legal theorist at

¹ Malinowski, *Crime and Custom*, Part I, *passim*.

² *Supra* p. 18.

³ Malinowski, *Crime and Custom*, 58. It should be added that the system Malinowski is describing is not merely what the Germans call “*Sittlichkeit*”, or the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which is “bad form” or “not the thing” to disregard (Haldane, *Higher Nationality* (1913), 38 *Am. Bar. Assoc. Rep.*, 393, 403); functionally, it is a system of law. Cf. *supra* p. 18.

any rate, to be of considerable significance ; it is also a question which is easier to state than to solve. For practical purposes perhaps it makes little difference what the assumptions of a subject are so long as the results appear to be satisfactory. But there is one lesson that mathematical analysis has taught us in recent years, and that is, in the words of Mr Tawney, that it is a wise philosopher who knows the source of his own premises. And no field of the law bears more serious testimony to the truth of this point than the field of contract.

It is important, before undertaking to say whether or not the agreements of the peoples of simpler cultures are in reality contracts as measured by our modern concepts, to know first what a contract is. Professor Corbin's¹ careful analysis of the term is perhaps the most useful starting point. Professor Corbin, after first stating the meaning of barter and gift,² defines contract as follows :

If A has apples (or land) to sell, and B has no money, a barter of apples for money is not possible ; but A may be willing to deliver his apples to B in return for B's promise to pay money in the future. If B agrees to this, receives the apples and promises to pay the money, a new physical relation exists as to the apples but not as to the money. As in the case of barter, or gift, society creates numerous relations between B and all other persons ; as to the apples, he has rights *in rem* against such other persons. B's rights are property rights and not contract rights. But the position of A is very different from that of barter. A has no money, and no

¹ Offer and Acceptance and Some of the Resulting Legal Relations (1917), 26 *Yale L. J.*, 169. Reprinted with revisions, *Selected Readings on the Law of Contracts from American and English Periodicals* (1931), 170

² Professor Corbin defines barter and gift thus : Barter "A mutual, present exchange of lands or chattels creates no contractual duty. If A has apples to sell and B has money, A may offer the apples to B for the money. B may accept by delivering to A the possession of the money. Such a transaction is barter." Gift. "If A has lands or chattels and executes a gift to B, which B accepts, there are acts of offer and acceptance and there is mutual assent, yet no contractual obligation is created."

rights *in rem*, good as against third persons who are not consenting; but a promise has been made to A by B, the fulfilment of which is commanded by organized society. If B fails to keep his promise, society will at A's request exercise compulsion against B, but will exercise compulsion against no other person. Special legal relations exist between A and B, A having a claim against B that he has against no other person, and B having a duty that rests upon no other person. These relations, with certain others that will not here be discussed, constitute the obligation; and since they arise from expressions of mutual consent, they are *contract*. A's special right against B is called a right *in personam*.

The heart of this definition, so far as it bears upon the point under discussion, is the meaning to be attached to the clause "a promise has been made . . . the fulfilment of which is commanded by organized society." All the essential elements set out by Professor Corbin are present in the agreements of the peoples of the simpler cultures¹ with the possible exception of the element of societal "command" and it is the nature of this element which would seem to determine whether or not there is any ground for distinguishing such agreements from contracts. Professor Corbin² has elsewhere defined what he means by the term "command" when employing it in contexts having the above significance:

When we say that society "commands" we do not mean that someone is shouting hortatory words at B from a housetop or from a throne, although there may be such an actual shout (as when the traffic policeman says "stop" or "move on"). We mean generally no more than that there is in some degree a uniformity of societal action and that unless B conducts himself in a certain manner this societal action will be detrimental to B.

Had Professor Corbin stopped at this point there would certainly be no ground for distinguishing the agreements of savages from the contracts of so-called

¹ The use of the terms "right" and "duty" ultimately flows, of course, from the concept of societal command.

² *Rights and Duties* (1924), 33 *Yale L. J.*, 501.

civilized man. But he shows further that the heart of his—and the general—conception of societal action (and thus ultimately of contract) “lies in the ‘sanction’ and only in the ‘sanction’.”

If it consists of action in accordance with some rule of general application by the executive or judicial representative of an organized governmental society the right and duty being enforced are recognized as jural. If the action detrimental to B is solely by individuals who are not representatives of such a society, the right and duty, if any are moral.

Here, I am inclined to think, Professor Corbin is defining “law” and that his analysis has brought him to Holmes’s¹ and Cardozo’s² conception of “law” as a prediction of what the courts will do in fact when the authority of an established principle or rule of conduct is challenged. On the basis of this conception of contract as a promise “the fulfilment of which has been commanded by organized society”, there is plainly a distinction between the agreements of primitive cultures, and the contracts of advanced cultures, as there are no executive or judicial representatives of organized society in primitive cultures, and there are no courts or agencies for the administration of justice in any way comparable to courts. We are thus forced to ask whether or not the present conception of “law” is altogether accurate. As we have seen above,³ the “law” of primitive and advanced cultures is functionally identical, but that definitionally there appears to be a real distinction. From this point of view it would follow that the “agreement” of primitive cultures and the “contract” of advanced cultures are, from the functional standpoint,

¹ *Collected Papers* (1921), 173.

² *The Growth of the Law* (1924), 52.

³ *Supra* p. 18.

identical. Both answer the same economic needs, play the same role in the social organization, and serve the same ends. If, on the other hand, there is a real distinction between the two systems of law it follows that there is a real distinction between primitive and advanced agreements. Should the difficulties which at present stand in the way be resolved and the two systems of law be embraced within the same definition then the present distinction between the two forms of agreement will disappear and they will be regarded as of the same class.

There is much more in this inquiry than a mere comparative study of cultures. "I am persuaded", writes Mr Justice Cardozo,¹ "that at the root of any satisfactory philosophy of growth, there must be an understanding of what it is that is to grow, a philosophy of genesis or birth." We are inclined to take our assumptions for granted, and to work in the midst of a subject rather than backwards towards the beginning. But a subject cannot advance beyond the limits of its assumptions, and if the assumptions, even though they are fictions, are ill-conceived, the effect on the subject sooner or later is disastrous. This is not to say that either the functional or the definitional view is to be preferred, although I am inclined to think that fresh insight, development and new power will probably result from the adoption of the functional view. Primitive economics here warns the jurist that in the field of contract he perhaps neglects his assumptions at his peril. Further investigation may show that there is substance in the warning or that there is not. In either event, the foundations of contract will be laid a little deeper.

¹ Op. cit. *supra* p 91, note 2 at 53.

When we pass from the special field of primitive economics to the general field of economics we are faced with an anomalous situation. There is an immense amount of discussion of the functioning of the contract institution, such as credit, investment, and free contract, but almost a complete absence of a consideration of contract as such. The classical economists ignored it and to-day, for all practical purposes, it is still apparently outside of what economists choose to regard as the domain of their subject, although both Ely¹ and Commons² would seem to have called attention to it with sufficient force. All that the economist apparently desires is that the law provide society with a sufficiently flexible, simple device—"a frame-work highly adjustable, a frame-work which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in case of doubt, and a norm of ultimate appeal when the relations cease in fact to work."³ The economist would probably quarrel with the doctrine of consideration and would agree with Professor Lorenzen⁴ that deliberate promises as such, when certain formalities are complied with, should be enforced. But few economists have spoken on the subject and there exists no such body of doctrine or discussion that would make it worth while to set out the views that have been expressed.

¹ *Property and Contract* (1914).

² *Legal Foundations of Capitalism* (1924).

³ Llewellyn, *What Price Contract?—An Essay in Perspective* (1931), 40 *Yale L. J.*, 704.

⁴ *Causa and Consideration in the Law of Contracts* (1919), 28 *Yale L. J.*, 621. See also Walton, *Cause and Consideration in Contract* (1925), 41 *L. Q. R.*, 306.

3. *Succession*

Legal theory is in accord with the classical economic doctrine which holds that inheritance cannot be deduced from the right of property and is not a natural right.¹ The establishment of the inheritance tax has been a matter of statutory enactment, and thus economists have been concerned with its ethical justification to a far greater extent than have the courts. Beginning with Bentham,² who proposed that intestate inheritance be abolished, the ethical basis of the inheritance tax formed one of the principal themes of economists of the nineteenth century,³ but no unanimity has been reached with respect to the ultimate ground upon which such a levy should rest. In the United States, since *Eyre v. Jacob*,⁴ the tax has generally been sustained on the ground that inheritance is a privilege upon which the State may place any burden it sees fit, and this would imply that it is ethically permissible for the State to charge for this privilege.⁵ There is much to be said in favour of this view, especially from the legal standpoint, and in the absence of a theory which is not altogether free from criticism, it serves well enough.

Present-day discussion, having accepted the inheritance tax as a *fait accompli*, has passed beyond the consideration of the nature of inheritance and the justification

¹ Wisconsin is the only jurisdiction out of step. *Nunnenmacher v. State*, 129 Wis. 190, 108 N. W., 627 (1906).

² Supply without Burden, or Escheat Vice Taxation (1795), 2 *Works*, 585.

³ For the history of the economic theory see Shultz, *The Taxation of Inheritance* (1926); Seligman, *Essays in Taxation* (10th ed., 1925), Chapter V; West, *The Inheritance Tax* (1908).

⁴ 14 Gratt 422 (Va., 1858).

⁵ Shultz, *op. cit.* supra note 3 at 183; Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment and Taxation* (1918), 31 *Harv. L. R.*, 905, 919.

of a tax upon it, to factual studies of the administrative and economic aspects of the tax, and to studies of possible reforms in its application.¹ These are matters which, in so far as they concern the law, are, for all practical purposes, outside the province of the courts, and rest almost entirely in the hands of the legislatures. The courts will do little more than see that the provisions of the tax do not offend constitutional guarantees. Proposed reforms in the application of the tax reach from Rignano's² plan to extend the graduated principle—now applicable to the amount of inheritance and the degree of relationship—to the time or period when the property was acquired, to Harlan E. Read's³ proposal to abolish inheritance altogether. There is no lack of economic guidance for proposed reforms in inheritance taxation, and at this late date it would be an act of foolhardiness on the part of a legislature considering reforms to ignore the factual studies and analytic assistance which economics has placed at its disposal. There is here no conflict between legal and economic theory; economics offers suggestions for various reforms in the details of the tax, the adoption of which would be a result of social pressure, and, in certain extremes, a result of the class struggle; but in their approbation of the levy as a proper fiscal device economic and legal theory are in agreement.

4. *Money-lending*

Professor Holdsworth⁴ has best summed up, from the legal position, the point of conflict between law and

¹ See Shultz, *op cit supra* p 94, note 3 at 172 for a discussion of the new literature.

² *The Social Significance of the Inheritance Tax* (1924).

³ *The Abolition of Inheritance* (1919).

⁴ 8 *Hist. E. L.*, 100.

economics on the question of sumptuary legislation designed to control the rate of interest.

At no time can the state be wholly indifferent to the use which the owners of property make of their property. More especially must it interest itself in the actions of those who, having a sum of ready money at their disposal, seek, without risk to themselves, to exploit the needs of poorer or less fortunate men, and to exact from them a reward for the loan of this money. Thus, at all times, the relations of the lenders of money on onerous terms to those in need of pecuniary assistance, require to be watched carefully, lest the processes of the law be used for the purposes of the most grievous oppression. In this country a very short experience of the consequences of allowing lenders and borrowers to make what bargains they please has been sufficient to demonstrate this fact; and this century has seen the state resume a control, which it had abandoned under the influence of the *a priori* theories of Bentham and of the pseudo-scientific laws of the school of *laissez faire* economists. In this, as in other cases, these so-called laws placed obstacles in the way of necessary legislative changes, some time after the purely temporary political and economic conditions, from which they were deduced, had ceased to exist.

Here Professor Holdsworth has given the traditional legal statement of the problem of the regulation of the rate of interest, but he has not, in this instance at least, followed his customary practice of stating fairly and accurately the position of his opponents. It would seem from his statement that there was but one problem involved—the problem of whether or not the State should protect the indigent in their relations with money-lenders. To-day, economic as well as social opinion would condemn as ethically indefensible a doctrine which would be an obstacle to the extension of such protection, and Bentham,¹ in refuting the notion that one purpose of the usury laws was the protection of indigence against extortion, was refuting it, not with reference to statutes regulating the business of making

¹ *Letters in Defence of Usury* (1787).

small loans, but with reference to statutes fixing a maximum interest rate on monetary transactions. Bentham's arguments were directed at the Statute of Anne¹ which fixed the rate of interest at five per cent.; this statute was repealed in 1854,² as a result of his arguments, and no similar statute has been re-enacted in England, although the Statute of Anne has been the model which most of the American statutes regulating the interest rate have followed. In 1900 the English Money-lenders Act³ was passed, but this statute is aimed at the professional money-lender and does not attempt to fix a maximum interest rate.⁴ Thus there are two problems—and not one, as Professor Holdsworth would seem to indicate—which have to be considered in connection with the legal regulation of usury: (a) whether or not statutes fixing a maximum interest rate on credit transactions are necessary, and (b) whether or not statutes regulating the business of making small loans are necessary. From the earliest times it has been a task of seemingly endless difficulty to explain why a lender should receive in return not only what he lent but something in addition.⁵ Marshall⁶ believes, in view of the conditions obtaining in

¹ 12 Anne st 2 c 16.

³ 63, 64 Victoria c 31

² 17, 18 Victoria c 90

⁴ The court can give relief if "the interest charged in respect of the sum actually lent is excessive," or if "the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive," or if "the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief" Ibid., op. cit. supra note 3. For an analysis of the English Moneylender's Act, 1927, see Orchard and May, *Moneylending in Great Britain* (1933)

⁵ For the history of usury and usury theories see I Ashley, *Introduction to English Economic History and Theory* (1919), Part I, Chapter III, Part II, Chapter VI, Brissaud, *History of French Private Law* (1912), 319 seq., Tawney, Introduction to Wilson, *Discourse upon Usury* (n.d.); Böhm-Bawerk, *Capital and Interest* (1890), Ryan, *Usury and Usury Laws* (1924). 2 Palgrave, *Dictionary of Political Economy* (1894), 429.

⁶ *Principles of Economics* (8th ed. 1930), 584. Cf *Politics* of Aristotle (Jowett's trans., 1885), Notes, Bk. I, 10, 5.

rudimentary societies, where there are few openings for the employment of fresh capital in enterprise, and anyone possessing property that was not needed for immediate personal use would seldom forego much by lending it on good security to others without charging any interest for the loan, that it is an open question whether or not it is to the public advantage, in such societies, that people should be encouraged to borrow wealth under a contract to return it with an increase after a time. In Ancient Babylonia, and among the Greeks and the Romans, the taking of interest was an established custom¹; according to Tacitus² it was unknown among the Germans; it was also forbidden by the Mosaic law³ and the Koran.⁴ Aristotle was the first to oppose usury upon theoretical grounds. His argument, which was to have a wide influence in the following centuries, was that the "term usury (τόκος), which means the birth of money from money, is applied to the breeding of money because the offspring resembles the parent. Wherefore of all modes of making money this is the most unnatural"⁵; in other words, that money itself is barren, and that to derive interest from it is unnatural. In the Middle Ages, usury was condemned by theologians and lawyers upon the authority of the Gospel precept "Lend, hoping for nothing again"⁶ and upon the Mosaic law, but mainly upon the distinction in Roman law between *consumptibles*, things such as corn, that are consumed in use, and *fungibles*, such as a house, which is

¹ Ryan, op. cit. supra p. 97, note 5, Palgrave, op. cit. supra p. 97, note 5, ibid.

² *Germania* (Loeb, ed. 1914), Chapter XXVI

³ Lev. xxv. 35-7, Deut. xxiii. 19-20.

⁴ 6 *Sacred Books of the East* (1880), 44, *The Qur'an* II, 275

⁵ *Politics*, I, 10, 5 (Jowett's trans.). Cf. *Merchant of Venice*, where Antonio taunts Shylock with taking "a breed for barren metal" Act I, Sc. 3

⁶ Luke vi. 35.

not consumed by use. Money belonged to the first class, so that to demand usury was, as it were, to sell a thing, and then make a charge for the use of it, which was unjust.¹ But by the end of the fifteenth century economic conditions had so changed that it was recognized that a payment for the use of borrowed money could be advantageous to all the parties to a contract and to the State²; thereafter the history of usury is the history of the exceptions devised to distinguish between the permissible and the illegal payment for the use of money.

Classical economic thought since Bentham's time has done much to strengthen his contention that maximum statutory interest rates are not only an unsettling factor in economic life but are utterly futile. Interest, first of all, is regarded as a necessity, even in a purely communistic state. Böhm-Bawerk³ and Fisher⁴ support this contention upon the ground that if exchange is permitted there will always be a difference of value between present and future goods. They regard the Marxian position as resting upon the point that the labourer should *now* receive the entire *future* value of his product, whereas they think the labourer should *now* receive the entire *present* value of his product, or should receive the entire future value of his product *in the future*. Henderson,⁵ perhaps more tenably, is of the opinion that it is necessary to charge interest to limit the demand for capital :

A world socialist commonwealth would require to retain a rate of interest, if only as a matter of book-keeping, in order to

¹ Ashley, *op cit supra* p 97, note 3, Pt. I, 152.

² 8 Holdsworth, *Hist. E. L.* 103.

³ *Positive Theory of Capital* (1891), 365.

⁴ *Theory of Interest* (1930), 49

⁵ *Supply and Demand* (1922), 130.

choose between the various capital undertakings that were technically possible. And this is the primary function which the rate of interest fulfils in our present-day society. It separates the sheep from the goats. It serves as a screen, by means of which capital projects are sifted, and through which only those are allowed to pass which will benefit the future in a high degree.

Economists having agreed that interest is necessary, the next step is to determine whether or not there is an ideal rate of interest, or more explicitly, whether or not there is a point above which the interest rate in credit transactions is unjust or mischievous. From the standpoint of either the time-preference theory, which conceives of interest as the premium which present goods command over future goods, or the equilibrium theory, which regards the rate of interest as settling at a point determined by the pull of two economic forces—the two principal theories of interest—the question is plainly answered in the negative.¹ The rate of interest is the resultant of factors which are beyond legislative control; any attempt to regulate the rate of interest by sumptuary legislation will only result in the practice of evasions similar to those winked at by the authorities during the centuries when usury was under its strictest ban. In addition, attempts to control the rate of interest sometimes produce grave hardships, and run counter to well established ethical business practices. In *New York Dry Dock Company v. American Life Insurance and Trust Company*² the Dry Dock Bank, at a time when money was tight, borrowed £48,000 and promised to repay £50,000 at six per cent. It was held that the reservation of

¹ Ryan, op. cit. supra p. 97, note 5 at 63-74 has an adequate account of the bearing of the various theories of pure interest upon statutory maximum interest rates.

² 3 Sand. 215 (N. Y., 1846).

£2,000 on the principal sum made the contract usurious and that the Bank was under no legal obligation to return the money. As a result of this case the now customary statute that a corporation cannot plead usury as a defence was enacted in New York. But the great majority of American States still retain on their statute books the maximum interest laws which academic economic thought universally condemns. "It is just as absurd for legislatures to attempt to fix or limit the market rate of pure interest", concludes Professor Ryan¹ in his able survey, "as it was to attempt to fix the prices of the necessities of life."

This is the essence of the classical position with respect to statutory interest rates. Economics, however, shares with the natural sciences the characteristic of not presenting a united front on all issues. There still remains to be indicated briefly the Marxian opinion on the subject of interest. Marx is in at least implied agreement with the academic position in holding that statutory maximums are futile. Interest is conceived of by Marx as a function of profit, of surplus value. "There is no reason by which the idea could be justified", he writes,² "that the average conditions of competition, a balance between lenders and borrowers, should secure

¹ Op cit. supra p 97, note 3 at 74. Cf Reeves, *A Comparative Statistical Study of the Interest Rates Prevailing in Federal Reserve Bank Cities from 1919 to 1929* (1931). Reeves found that the major seasonal fluctuations in the interest rate were national rather than local "but that there were considerable differences in the extent of these fluctuations in the respective money markets. Interest rates advanced in the early spring (February, March and April), and then declined until they reached their low point of the year in June or July, from which they again advanced during August, September, October and November, and declined again in December and January."

² 3 Marx, *Capital* (1909), 426-7. Marx however believed that there was a rate of interest which could be termed average. This rate is more or less of a uniform magnitude because the general rate of profit varies only in long intervals Ibid., 430.

for the lender a rate of 3, 4, 5 per cent., etc., on his capital, or a certain percentage of the gross profits, say, 20 per cent. or 50 per cent. Whenever competition as such determines anything in this matter, its determination is a matter of accident, purely empirical, and only pedantry or fantasticalness can attempt to represent this accidental character as something necessary." However, if the rate of interest is subject to economic forces which cause it to fluctuate over periods of time, "an average rate of profit has to be assumed as a legal rate even in many law disputes, in which interest has to be calculated."¹ But here Marx and the classical economists part company. The labourer receives in wages only enough to enable him to subsist and to reproduce his kind; but he produces more than his subsistence. This surplus is appropriated by the capitalist who has purchased the labour-power for a subsistence wage, and it is from this fund that interest is paid.² Thus interest is condemned as robbery. The classical economists report periodically that this theory is dead but the present state of the corpse need not detain us here. It may be pointed out, however, that it is now generally recognized that the theory of Surplus Value is independent of the Labour Theory of Value and the maladies which seem to have afflicted this latter theory imply nothing with respect to the well-being of the former.

There is, at this late date, no question but that statutes regulating the business of making small loans are

¹ Marx, *Capital* (1909), 430.

² *Ibid.*, 971. It is interesting to observe that Lapidus and Ostrovityanov in their analysis of the Soviet economy (*An Outline of Political Economy* (1931), 260-1), while admitting the necessity of interest, deny that sums received as interest in the U.S.S.R. are interest in the capitalist sense of the term, since they are not derived from surplus value.

necessary.¹ In this field there is an unquenchable demand for credit which sumptuary legislation can never suppress. Countless investigations have revealed only two alternatives: either small loan agencies will be permitted by the community to carry on their business at rates which are compensatory, or else the loan shark, and all the evils attendant upon his method of doing business, will flourish. In 1916, after an extended study of the small loan business, the Department of Remedial Loans of the Russell Sage Foundation drafted a Uniform Small Loan Law, the purpose of which is to provide safe facilities for the small borrower. It provides for regulation of the business of making loans of \$300 or less, specifying a maximum rate of interest of $3\frac{1}{2}$ per cent. a month on unpaid balances. To date the law has been enacted in twenty-five states.² From the social point of view its great merit lies in the fact that loans can be made on a business basis to persons having no other security than household goods or the expectation of regular wages. The immensely valuable study of Robinson and Stearns, *Ten Thousand Small Loans*,³ the conclusions of which are based on a factual study of borrowers in 109 cities in seventeen states, reveals that furniture was the security for 90 per cent. of the loans.⁴ The Uniform Small Loan

¹ Ryan, op cit. supra p 97, note 5, Radin, Debt (1931), 5 *Encyc Soc Sci.*, 32, Gallert, Hilborn and May, *Small Loan Legislation* (1932), Hamilton, The Small Debtor (1933), 42 *Yale L. J.*, 473, Robinson and Stearns, *Ten Thousand Small Loans* (1930), Clark, *Financing the Consumer* (1930), Jain, *Indigenous Banking in India* (1929), Raby, *The Regulation of Pawnbroking* (1924), Ham, *The Trend and Progress of the Movement to Improve Small Loan Conditions* (1921), Moulton, *The Financial Organization of Society* (2nd ed., 1925), Hodson, *The Fair Rate of Interest for Small Loans as made by Money-Lenders* (1923), Smith, *The Facts About the Small Loan Business and the Scientific Rate of Fair Charges* (1922), *Year Books of American Association of Personal Finance Companies*. A valuable bibliography is appended to Clark, op cit supra.

² See tables Clark, op cit supra note 1 at 251 sq, *Year Book American Association of Personal Finance Companies* (1930), 250.

³ Op. cit. supra note 1

⁴ p 139.

Law does not appear, however, to be a final solution of the problem and a revised draft of this law, based upon the experience of small loan agencies, is to be shortly presented to the public.¹ The so-called "42 per cent. a year" rate is one of the principal provisions of the present uniform law that has been subject to attack, and in 1929 the West Virginia legislature passed a law reducing the maximum permitted rate of interest on small loans from $3\frac{1}{2}$ per cent. to 2 per cent. a month on unpaid balances. The small loan agencies insist that such a rate of return does not permit them to do business and since the passage of the law the majority of them have closed their offices in that state.² To meet the contention that $3\frac{1}{2}$ per cent. a month on unpaid balances is necessary, it has been proposed that a sliding scale of maximum rates based upon the amount of the loan be adopted: say, for example, 4 per cent. on loans of less than \$50; 3 per cent. or $3\frac{1}{2}$ per cent. on loans of \$50 to \$100; $2\frac{1}{2}$ per cent. on loans of \$100 to \$200; and 2 per cent. on those from \$200 to \$300.³ The administrative measures of the small loan law, however, are still in an experimental stage and the answers to many of the problems they raise can be found only by such painstaking factual analyses as that undertaken by Robinson and Stearns. There can be no doubt, however, that legislation of the general type of the Uniform Small Loan Law is a social necessity and that the Uniform Small Loan Law itself is a material step in the right direction.

¹ *Year Book*, op. cit. supra p. 103, note 2 at 244. For a discussion of some of the defects in the present small loan law see Fisher, *The Small Loan Problem Connecticut Experience* (1929), 19 *Am. Econ. R.*, 181, and *The Small Loan Business* (1931), Supplement, 21 *Am. Econ. Rev.*, 11.

² Clark, op. cit. supra p. 103, note 1 at 198-9.

³ *Ibid.* at 246

5. *Taxation*

Classification is generally the first step taken in the attempt to place a particular subject on a scientific foundation, and while it is not of supreme importance so far as the legal aspects of taxation are concerned, it is a step which possesses sufficient significance not to be ignored. Contributions to public revenue, from the standpoint of the individual, are either gratuitous, contractual or compulsory.¹ With respect to those contributions which are compulsory, it is the custom of the courts to refer most of them to the state's power to tax, but some to the police power, depending upon whether or not the imposition is for revenue or for regulation.² Professor Seligman,³ who is chiefly responsible for the classificatory system of public revenues now generally accepted by economists, believes that this distinction, to a great extent, is a fiction, referable to certain difficulties in American constitutional law and to a lack of economic analysis on the part of the judiciary. This contention rests upon two grounds: (1) that a tax is no less a tax because its purpose is either regulation or destruction, and (2) a failure of the judiciary to distinguish between fees and taxes. For reasons of public policy, or because particular localities have not been granted taxing powers, the courts frequently uphold demands for money on the ground that they are not taxes but duties imposed for regulation. Professor Seligman believes that while this may be expedient from the legal point of view, and there can be no doubt that in many cases it is, the distinction from the economic standpoint

¹ Seligman, *Essays in Taxation* (10th ed., 1925), 400

² 4 Cooley, *Law of Taxation* (4th ed., 1924), 3510.

³ Op. cit. *supra* note 1 at 402-6.

is, nevertheless, wholly unnecessary. The second point requires more analysis. Taxes, from the legal position, are classified into three groups: (1) poll taxes, (2) taxes on property, and (3) excise taxes.¹ From the economic standpoint, excluding, as of no importance, gifts, expropriations, and fines, the sources of revenue are (1) quasi-public prices, (2) public prices, (3) fees, (4) special assessments, and (5) taxes,² of which (1) and (2) are referable to contractual payments and the remaining three to the taxing power. However, when the courts distinguish licence fees from taxes and uphold licence fees as an exercise of the police power Professor Seligman maintains that the courts are confusing taxes with the taxing power, and that they are also groping after the real distinction between fees and taxes. This distinction is not synonymous with the distinction between the police power and the taxing power because many classes of fees, such as court fees, cannot be referred to the police

¹ *In re McPherson*, 104 N. Y. 306, 10 N. E. 685 (1887), *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4 (1921), *State v. Shipman*, 290 Mo. 65, 234 S. W. 60 (1921). 1 Cooley, op. cit. supra p. 105, note 2 at 118.

² Seligman defines the terms as follows (op. cit. supra p. 105, note 1 at 432).

A *quasi-public price* is a voluntary payment made by an individual for a service or commodity sold by the government in the same way as a private individual would sell. Professor Plehn has suggested that the term "rate" is to be preferred to the term "price". *Introduction to Public Finance* (5th ed., 1926), 60.

A *public price* is a payment made by an individual for a service or commodity sold by the government primarily for the special benefit of the individual, but secondarily in the interest of the community.

A *fee* is a payment to defray the cost of each recurring service undertaken by the government primarily in the public interest, but conferring a measurable special advantage on the fee-payer.

A *special assessment* is a payment made once and for all to defray the cost of a specific improvement to property undertaken in the public interest, and levied by the government in proportion to the particular benefit accruing to the property owner.

A *tax* is a compulsory contribution from the person to the government to defray the expenses incurred in the common interest of all, without reference to special benefits conferred.

power. The real distinction between fees and taxes, that is, the distinction between an imposition as a payment for a special privilege, and an imposition as a part of a common burden not susceptible of direct measurement, is the solution which the courts have been feeling for in drawing the line between payments under the police power and those under the taxing power. The failure to make this distinction has been partially responsible for the confusion in American law from the standpoint of public finance in that taxes are referred indiscriminately, some to the police power and some to the taxing power. Were it not for the fact that the courts feel obliged to uphold or strike down certain levies according to whether or not the levies conform to juristic conceptions of public policy, and that the distinction between the police power and the taxing power is a convenient device in certain instances to assist in this undertaking, the legal classification of public revenue could possibly be brought in line with the more scientifically conceived economic classification.

No aspect of taxation is more fundamental and more difficult of solution than the problem of ascertaining the basis upon which to determine the amount of money each individual should pay. The benefit principle and the faculty principle are the two most important concepts which have been suggested as the measure of taxation.¹ The principle that each individual should pay according to the benefit he receives is of considerable antiquity and it is the one to which the courts are, in the main, committed. Cooley² has, with commendable

¹ For the history of the benefit and faculty principles see Seligman, *Progressive Taxation in Theory and Practice* (2nd ed., 1908), 150-289.

² 1 Cooley, *op. cit. supra* p. 105, note 2 at 213.

caution, best stated the legal interpretation of the principle :

If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges, cannot be measured by any pecuniary standard ; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of government, that the benefit received from the government bears some proportion to the property held, or the revenue enjoyed under its protection ; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But other considerations are always admissible ; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society.

The chief weakness of the benefit principle, that it is impossible to measure accurately the benefits conferred, was soon recognized by economists, and led to its abandonment and the adoption of the faculty theory in its place. This theory holds that the measure of taxation should be the ability of the individual to pay ; it is the theory which, with certain necessary modifications, is adopted to-day,¹ although it is itself far from being free of difficulties, chief of which is the meaning of the term "ability to pay". Various attempts have been made to give this phrase a more practical significance.

¹ Plehn, *Introduction to Public Finance* (5th ed., 1926), 91, Hunter, *Outlines of Public Finance* (1921), 109, Seligman, *Essays in Taxation* (10th ed., 1925), 540 ; Shurras, *The Science of Public Finance* (1924), 164, Jensen, *Problems of Public Finance* (1924), 210-12, Bastable, *Public Finance* (3rd ed., 1903), Bk. III, Chapter III.

Professor Carver's¹ principle of minimum sacrifice, which received its most acute elaboration and final statement in the hands of Professor Edgeworth,² is perhaps the most successful effort in this direction. Under the Elizabethan poor law, inhabitants of the parish, which was the unit for the assessment of rates,³ were assessed "according to the ability of the parish"⁴—a phrase which was interpreted to mean property.⁵ In American colonial legislation the terms "ability" or "faculty" were regarded as synonymous with "property",⁶ but later "faculty" was interpreted to mean revenue or income.⁷ The theory of the general property tax was that property was a satisfactory measure of ability, and in early communities this is to a certain degree perhaps true, but in a credit economy the equitable assessment of the multitudinous forms of property becomes an impossibility and there is a shift from property to income as the measure of ability. But although the substitution of income for property marks a considerable advance, there still remain obstacles to overcome. Sir Josiah Stamp⁸ has indicated six difficulties which must be considered when income is used as the measure of ability. These may be summarized as follows :

- (1) Quantitative—Is the amount of income the sole criterion?
- (2) Time element—Is not the amount of income plus the element of the period over which it accrues a better standard?

¹ The Ethical Basis of Distribution, 6 *Annals of the American Academy of Political and Social Science* (1895), 97

² The Pure Theory of Taxation, 2 *Papers Relating to Political Economy* (1925) 63.

³ 4 Holdsworth, *Hist. E. L.* 157

⁴ 43 *Eliz. c. 2*

⁵ Seligman, *Progressive Taxation*, 205 Cannan, *The History of Local Rates in England* (2nd ed., 1912), 22 seq. Cf. 72

⁶ *Op. cit. supra* p. 105, note 1 at 58

⁷ *Op. cit. supra* p. 105, note 1 at 206

⁸ *The Fundamental Principles of Taxation* (1921), 14-15.

- (3) Pure income—Is the income pure income without waste or return of capital?
- (4) Earned income—Is the income dependent upon the continuance of the worker's efforts or has it a reserve behind it?
- (5) Domestic circumstances—How much, due to personal and domestic conditions, is the worker free to spend?
- (6) Economic Surplus—Did the worker receive anything in excess of the sum required to induce him to give his services or lend his capital?

It is perhaps impossible from the practical standpoint to devise a tax in which all six points will be given their due proportion. They are a sufficient indication, however, of the difficulties still unsolved in the problem of the proper measure of taxation. The benefit theory appears to be the proper measure for fees but it is impossible of application as a measure for taxes. A further development of the faculty theory would appear to be the measure that will be finally adopted and if the inert pressure of tradition is not too intractable, it should eventually find its way into the body of judicial doctrine.

On the extensive and important question of the forms of taxation, economics has much valuable advice to offer legislators; as an aid in the judicial interpretation of fiscal concepts it can also be of material assistance. Economic thought has unsparingly condemned the general property tax as a failure from the triple standpoints of history, theory and practice, although, at the present time, there is a regeneration of the theoretical possibilities of the tax,¹ and it has given its general approval to the income tax, the two principal forms of taxation in the United States. It will undoubtedly have much more to say about the various post-war taxes of

¹ Plehn, *op. cit.* *supra* p. 108, note 1 at 191. *State and Local Taxation of Property*, National Industrial Conference Board, Inc. (1930), *passim*.

Europe, such as the sales tax, one of the two most productive taxes of modern times, which, under the pressure of expediency, have grown like mushrooms ; it can also supply valuable information in the drafting of a tax law with respect to its shifting and incidence. A notable example, as an aid in the interpretation of fiscal concepts, is the memorandum submitted by Professor Seligman¹ to the United States Supreme Court in *Eisner v. Macomber*² in support of the proposition that stock dividends were not income, the conclusions of which were accepted by the majority.³ On the perplexing question of the meaning of income, economics, if it has not yet spoken with finality, has had much to say ; on such unsettled problems as whether or not taxes on gross receipts derived from interstate commerce should be in lieu of state and local taxes, or in lieu of state taxes only, it has spoken occasionally. To what types of taxes states and communities should commit themselves, to and in what light their provisions should be interpreted are the most pressing of all problems of taxation from the standpoint of wise fiscal administration ; it is here that economics is a real aid to the legislator and the court.

6. *Business*

Within recent years there has developed a division of economics devoted to the analysis of the problem of the social control of business. This department of

¹ *Studies in Public Finance* (1925), 98-123.

² 252 U. S., 289 (1920).

³ The legal profession had no quarrel with the majority opinion on the economic aspect of the problem. Powell, *Stock Dividends, Direct Taxes and the Sixteenth Amendment* (1920), 20 *Col. L. R.*, 536; Warren, *Taxability of Stock Dividends as Income* (1920), 33 *Harv. L. R.*, 885 ; Clark, *Eisner v. Macomber and Some Income Tax Problems* (1920), 29 *Yale L. J.*, 735.

economics, which is concerned with one of the most complex phases of the social order, bids fair to become a major division of the subject and it is the department which will have the most significance for the law. By the term "social control of business" is meant the coercion, in the direction of communal as opposed to personal interests, exercised through the system of social relationships, the sum of which constitute the entity society, on the process of profit making.¹ From the legal position, the chief interest in the social control of business lies specifically in that coercion exercised through the legislative and the judicial (including administrative tribunals) processes. While the main form of control is that form which may be characterized as legal, there are, of course, many other forms, such as public opinion, trade unions, trade and professional associations, which exercise a coercive influence on the process of profit making in varying degrees. The importance of the problem of control, and particularly the role of the law as the principal agency, cannot be over-emphasized, as the fundamental order of economic life depends ultimately on the particular system of control which the community chooses to adopt.

The entire question of the social control of business, at the present time, is in so tentative a state that it is impossible here to do more than describe briefly the nature of the general theory which has been developed and to indicate the value to the law of such excursions into practice as have been attempted. Both C. Delisle Burns² and J. M. Clark³ have been notably successful in

¹ Clark, *Social Control of Business* (1926), 5-13; MacIver, *Society, Its Structure and Changes* (1931), 5-9; Keezer, *Art. Business*, 3 *Encyclopedia of the Social Sciences* (1930), 81.

² *Government and Industry* (1921).

³ *Op cit.* supra note 1

working out the principles of the subject, although I am inclined to think that the chapter devoted to this task in Laski's¹ *Grammar of Politics*, is, from the systematic side, perhaps of greater value. In the control of business three interests should be protected: the welfare of the industrial producer, the welfare of the consumer and the welfare of the investor. To the producer must be secured an adequate return of his labour, compensation for injuries incurred during the course of his employment, and safety in his conditions of labour, which include such problems as hours of labour, ventilation, safety appliances, light and working postures. The consumer must be assured a continuity of supply and he must also be protected against extortionate prices and defective quality in the goods furnished him. The investor in the typical industrial corporation, as distinguished from the one-man business or the average partnership, must be protected in the service rendered by the corporation and the return on his investment. The social control of business implies all these things and, perhaps, many more, although the above outline would appear to include the basic categories. In the legal field, the problems raised by these issues are old and familiar ones, and, if we regard ancient history here as irrelevant, they date at least from the Middle Ages in the attempts of the public authorities to regulate prices and wages, to prohibit actions which prevented goods from being brought to the open market, and to establish a simple procedure to enforce the payment of ordinary mercantile debts.² To-day, such problems are constantly before the courts in one form or another and it is largely

¹ (1925), Chapter IX.

² Ashley, *Economic History* (1892), 181 seq.

upon decisions dealing with them that economics depends for its material in working out its theories. At present, economics has little to offer in the way of a generally accepted ethical justification of the issues, and although the literature is still proportionately meagre, it has, nevertheless, much of importance to say with respect to the translation of the issues into realistic terms.

It is in the factual studies of legal-economic theories in action and in the detailed criticism of these theories that economics, in the field of business regulation, is rendering a notable service to the law. Within the past few years a number of such studies have appeared, of which Bauer's¹ *Effective Regulation of Public Utilities*, Keezer's² and May's *Public Control of Business*, Seager's³ and Gulick's *Trust and Corporation Problems*, Glaeser's⁴ *Outlines of Public Utility Economics* and Berle and Means's⁵ *The Modern Corporation and Private Property* are among the outstanding works. Bauer's study is particularly noteworthy for the systematic approach which is adopted, while the studies of Keezer and May, and Seager and Gulick, render distinguished service in the painstaking analyses of the economic theories of the courts in regard to anti-trust law enforcement and special problems of public utility regulation. The issues of which they treat are, however, still largely controversial and the economists so far are prepared to offer their conclusions only in a tentative fashion. It would be inappropriate to discuss these conclusions in this place both for this reason and also because any adequate treatment would require more space than is here justifiable. For the present purposes, it is sufficient to point out the nature of the work that

¹ (1925).

² (1930)

³ (1929).

⁴ (1927).

⁵ (1932).

is being done and to mark that, for example, if the Supreme Court in *Smyth v. Ames*¹ had used the terms "present cost", "actual cost" and "fair value" with full appreciation of their economic significance, much of the controversy in this field since that decision might have been obviated. The courts may be able to develop workable and sound theories in such matters without benefit of economics, but if they should turn to economics for assistance, progress will be much more certain and rapid than it is at present.

III. B. ASSOCIATIONS

1. Corporations

In the field of corporation law the role of economics is chiefly as an aid to the practising lawyer; as yet it has small additions to make to legal theory. Economics has been concerned with corporate activity mainly from the historical and the fiscal point of view. Also, as was pointed out above, it has been concerned with corporate enterprise from the standpoint of social control. On the historical side there are such outstanding works as Davis's *Essays in the Earlier History of American Corporations*² which deals with the legal and economic history of the corporation in the United States before 1800, particularly with the last two decades of the eighteenth century, and Dewing's³ *Corporate Promotions and Reorganizations*, a detailed survey of stages in the life histories of a selected group of industrial combinations. What immediate lessons for legal theory are to be drawn

¹ 169 U S, 466 (1898)

² 2 vols. (1917)

³ (1914).

from studies of this type it is difficult to determine until the occasion for such deductions creates them; at all events, even if their value is no greater than the value of historical legal studies in general, the law is under a real debt to economics for its contributions in this department. That such studies nevertheless are not without their present benefit is indicated by the point, now fairly well established, that the early English borough and the medieval guild—the associations to which, it is believed, corporations owe their origin—did not owe their creation to crown franchise but were the product of a gradual social development and that after attaining a certain stage—from the time of Henry VI—they fixed their legal status by procuring from the King patents recognizing their corporate existence.¹ The importance of this point lies in its relation to the legal doctrine in the United States that corporations owe their existence to the state.

As an aid to the practising lawyer, who, in connection with problems of corporation finance, must frequently advise his clients not only with respect to the legal but the economic aspects of the matters with which he is dealing,² economics has much to offer. On the purely fiscal side the now classic work of Mead,³ the studies of Dewing,⁴ Bishop,⁵ Reed⁶ and others are of invaluable

¹ Berle and Means, *Art. Corporation*, 4 *Encyclopaedia of the Social Sciences* (1931), 414, Berle, *Studies in the Law of Corporation Finance* (1928), Chapter I.

² See Cravath, *The Reorganization of Corporations in Some Legal Phases of Corporate Financing Reorganization and Regulation* (1917) for a discussion of some of the economic problems upon which the attorney of to-day is called upon to give advice.

³ *Corporation Finance* (6th ed., 1930).

⁴ *Financial Policy of Corporations* (1926).

⁵ *Financing of Business Enterprises* (1929).

⁶ *Principles of Corporation Finance* (1925).

assistance. These studies are, to a large extent, descriptive ; but they also have, as in Dewing's¹ application of the so-called " law of balanced return " to industrial combinations, much to say, from the analytical position, that is significant. In what directions work of this type will modify legal theory it would be premature to say ; but that it will ultimately be reflected in the decisions of the courts is inevitable.

2. *Labour*

No phase of the relation of law and economics presents such difficult problems as that aspect which is concerned with the general subject of labour. Here it would seem impossible to eliminate the influences of traditional inheritance and class bias when the basic questions—unemployment, wages, hours of labour, collective bargaining, industrial insurance against all economic hazards, the safeguarding of the physical welfare of the worker—are considered. With respect to all of these problems the opinions of those most competent to speak are irreconcilable ; in many cases data exists which would appear to be sufficient to support judgments possessing at least a degree of finality but the interpretations of the data are numerous. It would be an unprofitable, if not an impossible, task to attempt, in the present discussion, to harmonize the opinions in

¹ Op. cit. supra p. 116, note 4 at 664. Cf. *Ibid.*, Appendix, Book IV. Cf. Mead, op. cit. supra p. 116, note 3 at 473 for a criticism of Dewing's conclusions in this connection. The law of balanced return, which is an adaptation of the law of diminishing return to corporate enterprise, is, "the ratio between the quantitative values of labour and fixed capital in any unit of product determines the point at which increase in the scale of total production ceases to be economical, i.e. it determines the point of maximum productivity beyond which further investments of fixed capital and further increments of labour cease to yield the same proportionate quantity of product." Dewing, op. cit. supra p. 116, note 4 at 653-4.

regard to labour problems or even to attempt to state exactly what the problems are. Two points, however, may be briefly noted. First, the efforts of labour to secure more favourable conditions of service have resulted in the development of a body of law which, when we see beyond the present classifications, may well be regarded as one of the fundamental divisions of the subject, comparable to (say) Torts or Contracts. Probably no branch of the law is developing with more rapidity, and in no branch of the law is economics playing a more influential role. The cases deciding controversies between labour and capital turn more often on the economic opinions of judges than on the limitations of constitutions. But the body of legal doctrine which has grown from such cases still remains to be systematized; labour law yet awaits its Wigmore or its Williston. Secondly, economics comes into perhaps its closest relation with the law in those cases involving the constitutionality of statutes designed to give protection to the labouring classes. At first the tendency of the courts was to decide such cases without reference to the particular facts upon which the statutes were predicated, but since the Supreme Court in *Holden v. Hardy*¹ gave its approval to the factual method, the attitude of the courts has materially changed and social legislation now has a fair chance of being considered in relation to the conditions which prompted it. That the factual method is a powerful weapon is well illustrated by the cases of *People v. Williams*² and *People v. Charles Schweinler Press*.³ In the first case the New York Court

¹ 169 U. S., 366 (1898).

² 189 N. Y., 131, 81 N. E., 778 (1907).

³ 214 N. Y., 395, 108 N. E., 639 (1915).

of Appeals held unconstitutional a statute prohibiting night work for women upon the ground that it was "discriminative against female citizens, in denying to them equal rights with men in the same pursuit". No consideration was given by the court to the economic conditions which induced the legislature to pass the statute. In the second case, a similar statute—this time one which had been passed at the recommendation of a Factory Investigating Commission—was upheld, after a full consideration of the facts and a complaint of "the failure adequately to fortify and press upon our attention the constitutionality of the former law as a health and police measure and to sustain its constitutionality by reference to proper facts", upon the ground that it was valid as a police regulation in the interests of public health and the general welfare. It is largely upon complete and accurate investigations of economic conditions that the courts, in determining the constitutionality of labour measures, and the legislature, in ascertaining whether or not in the first instance such legislation is necessary or proper, must depend, and it is principally to the investigations of economists that they must turn for their assistance.

IV. SYNTHESIS AND HISTORY

Two additional and significant points of contact between law and economics remain for discussion—the correlation of economic and legal principles, and the economic interpretation of legal history. Professor Common's¹ *Legal Foundations of Capitalism*, which emphasizes the legal role in the economic order, also opens

¹ (1924).

a fruitful field of research but one beyond the limits of this chapter. Professor Llewellyn¹ was, I believe, the first to suggest that economic principles might be extended to the domain of the law and applied to the solution of legal problems, although the method of borrowing principles from one subject and applying them to problems in another is a common and occasionally valuable method in the natural sciences. That it is a method which must be used with the utmost caution, no one is more aware than Professor Llewellyn.² "Such a concept as that of scarcity of energy for law enforcement," writes Professor Llewellyn,³ "with the corollaries of necessity for choice among policies and of the problem of legal engineering, is borrowed directly from economics. So, too, the thought that more or less social energy is apportioned to the enforcement of law according to the intensity of the felt need for order, and according to the adequacy with which other means of community discipline cover the necessary ground, is not only derived from but is illuminated by the economics of supply and demand and the doctrines of competing and substituting commodities. Finally when one attacks the effect of the law in shaping conduct, in the profusion of cases where established morals or habits of self-discipline seem to make law unnecessary, one is led to hope that the marginal concepts may point the road to understanding." That Professor Llewellyn has opened a stimulating and valuable field of research is plainly apparent. It is a field, however, which remains to be

¹ *Effect of Legal Institutions upon Economics* (1923), 15 *Amer. Econ. Rev.*, 665.

² *Legal Research* (1930), *American Law School Review*, 670, 676.

³ *Ibid.*, note 1.

worked out and its utility tested, tasks unnecessary and too elaborate to attempt in the present chapter.

Few will doubt that the greatest weakness of the doctrine of the economic interpretation of history lies not in any philosophical weakness of the theory itself but in the attempts of its warmest disciples to apply it. Beginning in 1859 with Marx, and rising to its position of highest esteem and influence in the last decade of the nineteenth century and the first decade of the twentieth century, it attracted many historians to its banner.¹ But, as is sometimes the case with a fresh method, the attempt was made to prove too much, and many who otherwise would have found the method acceptable were repelled by the exaggerated, if occasionally brilliant, conclusions of those who adopted it. Nevertheless, if the theory cannot to-day be defended from the standpoint of a monistic interpretation of social phenomena, it is still valid from the less universal position of regarding the economic factor as one of the prime influences in history, and, when so viewed, there is little doubt that those who have attempted to apply the theory have been subjected to much unfair criticism. In the hands of capable students of jurisprudence it has led, and can lead, to results of the utmost value. It is his judicious recognition of the economic element as a determining factor in legal development that contributes so much to the value of Holdsworth's *History of English Law*. A legal historian who to-day ignores the economic factor runs the gravest danger of robbing his work of one of its

¹ See generally, Seligman, *Economic Interpretation of History* (2nd ed., 1912), Patten, *Development of English Thought* (1899), Croce, *Historical Materialism and the Economics of Karl Marx* (1914), *The Communist Manifesto* in Postgate, *Revolution, 1789-1906* (1921), 140; see Pound, *Interpretations of Legal History* (1923), Chapter V, for the economic interpretation of jurisprudence.

most vital elements, and any school of jurisprudence which omits it from its programme does so, if the lessons of the past have any meaning, at the risk of being quickly forgotten.

V. CONCLUSION

In this chapter the attempt has been made to consider systematically the contributions of economics to law. What appeared to be the most important legal-economic institutions and associations were adopted as the focal point for the discussion, but this is not to say that a different approach might not serve even better. The concept of the social control of business, for example, might well be utilized as the point of departure for an analysis of legal-economic inter-relations. Throughout this chapter the emphasis has been upon the contributions that economics can make to the law at this time ; what it can do in the future when certain of its divisions are more developed has been briefly discussed. From this method of attack, two conclusions would seem to follow : First, that economics has definite contributions to make to the law. Secondly, that many of the problems which the courts undertake to solve in reality are economic problems more strictly than they are legal problems, and for the courts to endeavour to solve such difficulties with the sole aid of legal standards, which frequently amount to no more than vague ideals, is productive not only of immense confusion in current legal theory, but, as in the hours of labour and minimum wage cases, may result in disaster to large classes of society. The courts still attempt to decide upon the basis of legal standards whether or not a particular individual is mentally disordered ; to argue that economic problems should be

decided with at least a full understanding of economic principles is to indulge, perhaps, in wishful thinking. But the law must either abandon its *a priori* method of handling social questions in favour of a method which estimates such questions upon the basis of actual knowledge, or it deprives itself of much of its effectiveness in those fields in which it is the most important instrument for the settling of social problems.

CHAPTER IV

SOCIOLOGY

SOCIOLOGY, as a branch of knowledge devoted to the systematic study of social phenomena, has been interpreted from four points of view. It has meant (a) a separate social science, (b) a synthesis of the other social sciences, (c) the basic social science and (d) a method of studying social phenomena. It has been approached, it need hardly be added, from other standpoints as well, but the interpretations which have been given the widest expression would seem to be those indicated.¹

It would not be possible to venture much beyond this statement of the meaning of sociology without becoming involved in the abundant quarrels of its students over its definition and the limits of its subject matter. There is no general agreement among sociologists with respect to such basic problems. It is not, however, necessarily a criticism of sociology that the sociologists of each school and of each country view it from diverse vantage points. In all branches of knowledge the definition of basic concepts is an accomplishment which is never satisfactorily realized during the formative stages. Analysis and definition of basic concepts is as much a part of the field of investigation of a subject as is the study of its routine problems; and the fact that a subject's primary concepts do not yield readily to analysis implies nothing with respect to its

¹ Cf. Barnes, *Sociology and Political Theory* (1924), 22.

standing in relation to other branches of knowledge. Nor does it imply that the routine problems of its subject matter cannot be investigated and successfully handled. Social phenomena had been systematically studied and much sociology had been written long before Comte gave this branch of knowledge a name.

For the legal student approaching sociology from the standpoint of its possible contributions to juristic thought, the fact that sociologists are unable to agree upon a definition of sociology, or sharply differentiate its domain from the domain of, say, cultural anthropology, should give him no concern. The sociologist who turns to jurisprudence for the definition of law will find a similar lack of agreement among jurists with respect to its definition. Nor is this condition peculiar to the subjects of law and sociology. In the fields of economics, history, psychology, ethics, anthropology and geography the divergence of opinion as to their definitions and proper domains is as wide as in sociology and law. Even logicians have not yet agreed on the definition of logic, a subject which, in its modern development, is almost as precise as mathematics. It would seem indeed that sociologists have been unduly sensitive in this connection, and have given too much of their labour to the explanation of the meaning of sociology, instead of devoting their chief inquiries to the major problems of the subject. This trend in sociology would appear, however, to be drawing to a close. Sociologists to-day are content to leave the definition of sociology and the markings of its limits as tasks of the future, and to devote their main energies to the analysis of social phenomena.

Before sociology assumed a place, under Comte, in the middle of the nineteenth century, as a separate

branch of knowledge, it had had a decided influence on the course of juristic thought ; the systematic correlation of social phenomena did not begin with Comte, although he was among the first to recognize that such treatment constituted a distinct inquiry, but extends back at least to the early Greeks. At all periods in the history of Western thought there has been a point of view which it is proper to denominate as sociological, although the writers holding it and endeavouring to apply it did not recognize it as a point of view which might be separately classified. This point of view, the essence of which is that contemporaneous social facts, as distinguished from physical or biological facts,¹ can be studied and correlated, or their relations exhibited, was recognized in jurisprudence as well as in economics, psychology and the other social sciences long prior to Comte. Professor Sorokin,² with great insight, makes the point that the precursors of the contemporary formal school of sociology—which regards itself as a new school and which holds that the proper object of sociology, as a separate science, is the study of the forms of social relationship as contrasted with the content, as studied by the other social sciences—were the Roman jurisconsults who first described the principal forms of social relations.

“If they are not regarded”, he writes, “as the predecessors and the representatives of the formal school, this is probably due only to the fact that their works have been styled juridical but not sociological. In their character, however, their works, even the very codes of law, beginning with *Corpus Juris Civilis* of Justinian, and ending with new codes of the civil, the constitutional, the criminal, and the processual law (not to mention corresponding theories)

¹ Cf Bernard, *History and Prospects of Sociology in the United States in Trends in American Sociology* (1929), 20.

² *Contemporary Sociological Theories* (1928), 498.

are the most brilliant samples of the formal analysis of human relationship or of the forms of social interaction. Their formulas of *Potestas*, *Imperium*, *Majestas*, and *Mannus* are incomparably better and more formal than the forms of domination in the characteristics of the contemporary formal school. Their formulas of *commercium*, *consensus*, *causio*, *beneficium*, various *obligationes*, contractual relations, *dominium*, *proprietas*, and *possessio*; their definitions of the *status libertatis*, *status civitatis* and *capitis diminutio*; of marriage, family, consanguinity, inheritance, and so on, represent, an ideal formal sociology which the formal sociologists may only envy and try to approach as near as possible."

Thus legal systematizers of all periods, from the position of one of the most advanced schools of sociology, are in truth sociologists of a high order. To say also that jurists since the early Greeks, in part of their labours at least, have been sociologists in the sense that the term is understood by the non-formal sociologists, is to deprive neither jurisprudence nor sociology of their meaning. In so far as jurists have attempted to correlate social facts, or to display their relations, they have been practising sociology.

Similarly, the contemporary school of sociological jurisprudence would appear to have a more ancient lineage than its adherents recognize. Although Montesquieu is stated to be a forerunner,¹ the school is supposed to have had its origin in the positivist philosophers of the middle of the nineteenth century in the sense that it has had a continuous development since that time.² Dean Pound,³ its chief representative in the United States,

¹ Ehrlich, Montesquieu and Sociological Jurisprudence (1916), 29 *Harv. L. Rev.*, 582. Pound, *Lectures on Jurisprudence* (4th ed., 1928), 14.

² Pound, Scope and Purpose of Sociological Jurisprudence (1911-12), 24 *Harv. L. Rev.*, 591, 25 *ibid.*, 140, 489, *Interpretations of Legal History* (1929), 71-2, *Jurisprudence in History and Prospects of the Social Sciences* (1925), 444, *Sociology and Law in The Social Sciences* (1927), 319, *Art Jurisprudence*, 8 *Encyclopædia of the Social Sciences* (1932).

³ *Ibid.*

believes that the school has passed through four stages : first, that it was mechanical in imitation of the mechanistic sociology of the nineteenth century which viewed the operations of nature from a mathematical standpoint ; secondly, that it was biological, under the influence of Darwin ; thirdly, that it was psychological under the influence of Ward, who insisted that psychic forces were the causes of all social phenomena ; and finally, that it is now in a stage of unification in which jurisprudence is being brought into co-operation with the other social sciences. Mechanical sociological jurisprudence, according to Pound, came into being as a result of the nineteenth century mechanistic movement in the social sciences, when the central point in scientific thinking was the mechanism of the physical universe.

But the mechanistic movement which occurred about the middle of the nineteenth century was but a recrudescence of the mechanistic movements of the seventeenth and eighteenth centuries. Acting on the analogy of Newtonian physics, the leading philosophers and social scientists of those centuries endeavoured, by an exhaustive analysis of what was termed human nature, to find the axioms applicable to the solution of social problems. This geometrical or mechanical point of view completely dominated the social thought of that time and it would be a curious phenomenon if the contemporary jurists had managed to insulate themselves from its influence, particularly as the jurists were often in the forefront of the mechanistic movement in other fields. As a matter of fact, the jurists of the seventeenth century are to be regarded as mechanistic sociological jurists equally with those of the middle of the nineteenth century. Thus

Hobbes,¹ in the Epistle Dedicatory to *The Elements of Law*, declares that it is his aim to reduce law "to the rules and infallibility of reason" which he conceives of as "mathematical and . . . free from controversies and dispute, because it consisteth in comparing figures and motions only." Leibnitz and Puffendorf, who were both influenced by the forgotten Lena mathematician, Edhard Weigel, also employed the geometrical method in their legal speculations. Puffendorf² in his *Elementarium jurisprudentiae universalis libro duo* with his *Definitiones*, *Axiomata*, and *Observationes*, and Leibnitz,³ with the predominately mathematical approach which characterizes his legal studies, were merely part of a movement which the strongest could not escape. Even Grotius,⁴ a highly original thinker, declared that he had treated law "just as mathematicians treat their figures as abstracted from bodies." These jurists, with their theories of "social mechanics", were the direct ancestors of the mechanical sociological jurists of the latter half of the

¹ (Tönnies ed 1928), Chapter XVII Professor Brandt, after a detailed survey of Hobbes' work, concludes "The whole of his philosophy is built up on the foundation of one single, quite simple idea, the idea of motion." *Thomas Hobbes' Mechanical Conception of Nature* (1928), 379

² (*Classics of International Law*, 1931.)

³ See MacDonell, *Leibnitz*, 2 Continental Legal History Series (1914), 283, Fink, *The Influence on the Mind of the Study and Practice of Law* (1872), 1 *Law Mag. and Rev.* (N.S.), 933. Keynes gives an interesting illustration of the influence of Leibnitz's mathematical investigation on his work in jurisprudence. In a letter to Placcius, Leibnitz proposed an application of the theory of mathematical expectation (which holds that in order to obtain a measure of what ought to be our preference in regard to various alternative courses of action, we must sum for each course of action a series of terms made up of the amounts of good which may attach to each of its possible consequences, each multiplied by its appropriate probability) to jurisprudence, by virtue of which, if two litigants lay claim to a sum of money, and if the claim of the one is twice as probable as that of the other, the sum should be divided between them in that proportion. Keynes adds that "the doctrine seems sensible but I am not aware that it has ever been acted on". *A Treatise on Probability* (1921), 311.

⁴ *Three Books on the Law of War and Peace* (*Classics of International Law*, 1925), *Prolegomena*, § 58.

nineteenth century as well as of such present-day mechanical sociologists as Haret,¹ Carver² and Barcelo.³

Sociology in recent years has exhibited a fresh vitality and a new power which have taken concrete form in the important studies published in this field since about 1918. These studies are frequently concerned with topics which are a part of, or are directly connected with, the domain of jurisprudence. But as both jurisprudence and sociology are still in their formative stages it is impossible to develop their present interconnections in any clearly systematic fashion. We can, however, take a wide view of sociology as it is now constituted and put our finger on those points at which it would seem that the sociologist had reached conclusions which are of value to the jurist. From this standpoint, the contributions which contemporary sociology appears to offer to jurisprudence would seem to lie along the following lines :

- (a) Sociological Theories of the Nature of Law.
- (b) The Sociological Method in Law.
- (c) Sociological Analysis of Socio-Legal Institutions.
- (d) Social Change and Legal Change.

(a) Sociological Theories of the Nature of Law

As a historical background, it will be helpful, before considering contemporary sociological theories of law, to devote some brief attention to the theories of law advanced by important sociologists before 1900. For

¹ *Mécanisme Sociale* (1910)

² *The Economy of Human Energy* (1924).

³ *Essais de mécanique sociale* (1925). For a comprehensive and penetrating account of contemporary mechanistic sociology see Sorokin, *op. cit. supra* p. 126, note 2, at Chapter I.

this purpose Montesquieu, Comte, Spencer and Ward are the most useful figures ; through them, we can approach, precisely and clearly, the present-day sociological concepts of law.

Montesquieu's *The Spirit of Laws*, Brunetière¹ has written, "is the wraith of a great monument, but the monument has never existed." Montesquieu's failure to investigate systematically the ideas he put forth was the result of the application of a method which he had deliberately adopted. "To write well," he said,² "it is necessary to skip intermediate ideas, enough not to be tiresome, not too many for fear of not being understood." There can be no question that Montesquieu carried this method to too great an extreme ; that he skipped too many intermediate but clarifying ideas. As a consequence, *The Spirit of Laws* is a brilliant and suggestive book ; it may even be, as it has been called from the point of view of literature, the greatest book of the eighteenth century ; but as an adequately reasoned, unambiguous exposition of Montesquieu's political ideas it falls far short of what is desirable. Nevertheless, for all its lack of orderly analysis, it is the fountainhead of the sociological approach to law.

Montesquieu's central ideas on the problem of the nature of law are set forth in the three brief chapters with which the book begins. "Laws, in their widest meaning," he writes with evident care, "are the necessary relations arising from the nature of things."³ This definition has brought upon Montesquieu's head much

¹ *Études critiques sur l'histoire de la littérature française* (4^{me} Serie, 1894), 259

² *Pensées et fragments inédits de Montesquieu* (1901), 14, no 802

³ "Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses" *De l'esprit des lois* (1871), Book I, Chapter I.

severe criticism, as much for its obscurity as because of its departure from accustomed modes of thought. Destutt de Tracy¹ said flatly, "a law is not a relation and a relation is not a law"; and Helvetius² added, laws are not relations, but the result of relations. But such statements do not give much help in attempting to reach Montesquieu's meaning. It has often been claimed for Montesquieu, and indeed he makes the claim for himself, that *The Spirit of Laws* was a work of surpassing originality; certainly of the writers concerned with social questions, from Locke to Condillac to Bentham, Montesquieu was the one least influenced by the mechanistic philosophy of the period. He did not, however, entirely escape its influence and I believe that, in his definitions of laws, whether he was aware of it or not, he was influenced by what may be called the Newtonian world-view. By defining laws as relations he was synthesizing the thought of his century. He meant nothing more by his definition than that, as he writes in his preface, the infinite diversity of laws and manners are not solely conducted by the caprice of fancy. In other words, he has anticipated in the identical language, the now widely held conception of a scientific law as a relation between events,³ or, in more popular terms, as the assertion of cause and effect. Montesquieu included in his definition of laws both physical laws and positive laws. But positive laws are not altogether the product of external causes as is the case with physical laws; they are determined in large part by human reason, and Montesquieu therefore states that positive law in

¹ Quoted, 2 Janet, *Histoire de la science politique* (5^{me} ed. 19-7), 333

² Ibid.

³ Dampier-Whetham, *A History of Science* (1929), 460. Campbell, *What is Science?* (1921), Chapter III.

general is human reason.¹ Nevertheless, he holds that positive laws should be so framed that they should be in relation to the characteristics of each nation; the role of human reason, in other words, should be minimized and laws should be framed so far as possible *as if* they were determined by the nation's characteristics.

"They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another," he writes in a famous passage "They should be in relation to the nature and principle of each government whether they form it, as may be said of politic laws, or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs."²

This is the heart of Montesquieu's conception of law. It is also the statement of the sociological conception of law; it recognizes and takes account of the influence of social conditions on the legal process. Montesquieu's definition of law as a relation contains an important element of truth, even if it is not sufficiently precise to be of much utility.³ Under its broad terms

¹ Book I, Chapter III.

² Ibid. (Bohn ed., 1909. Translated by Thomas Nugent) Montesquieu is here speaking, and throughout most of his book, of what ought to be (*devoir*), later on in the book he speaks of what must be (*devoir* of course is used in both senses, but in the above paragraph Montesquieu gives it the first meaning). "With him the two questions, how law is to be constituted to fit its outward condition, and how it is necessarily shaped by those conditions, often flow into one another," writes Ehrlich. Op cit. supra p 127, note 1.

³ In the light of Montesquieu's definition of law it is curious to observe Karl Pearson's efforts to differentiate scientific law from positive law. Pearson defined a scientific law precisely as Montesquieu defined all law. For the definition of positive law, Pearson, however, turned to Austin's "rule laid down for the guidance of an intelligent being by an intelligent being having power over him". He then proves, after many pages, that his conception of a scientific law is incompatible with Austin's conception of a positive law. *The Grammar of Science* (2nd ed., 1900), Chapter III. It would have been interesting to have had his opinion of Montesquieu's synthesis of the two concepts.

customary rules would be law as well as the rules of positive law. Montesquieu, however, in the high position from which he surveyed the characteristics of the peoples of the world perhaps meant to include customary rules under the term law, and we need have no quarrel with him on that account. His contribution lies in the fact that he was the first to see clearly, if not altogether adequately, that laws are not the arbitrary products of reason but are largely the result of the social forces obtaining in the community.

Comte had little interest in the governmental aspects of the social order, and the few ideas he advanced in this field were put forward casually and unmethodically. His opinions in the domain of the law can be summarized briefly.¹ Comte extended his famous Law of the Three Stages—the law that human theories necessarily pass through three successive stages: the theological or fictitious, which is provisional; the metaphysical or abstract, which is transitional; and the positive or scientific, which alone is definitive—to political progress.² In the first state, the theological and military, all theoretical conceptions bear a supernatural impress and all social relations are avowedly and exclusively military. Society makes conquest its one permanent aim. Industry is carried on only so far as it is necessary for the support of the race; the producers are slaves. The second epoch is metaphysical and juridical. It forms a link and is mongrel and transitional. Industry becomes more extended and industrial slavery is no longer direct;

¹ On Comte's political thought generally, see Montesquieu, *Le Système Politique d'Auguste Comte* (1907). Comte's political views are set forth in the *System of Positive Polity* (1853) particularly in Vol. II, *passim* and Volume IV, pp. 527-89.

² 4 *System of Positive Polity*, 572.

the producer, still a slave, begins to obtain some rights in his relations with the military. The two aims of activity, conquest and production, advance *pari passu*. Industry is at first favoured and protected as a military resource. Later its importance augments; finally war is regarded and systematically pursued as a means of favouring industry. The period is one of criticism and argument. In the third stage, the scientific and industrial, industry has become predominant. Society makes production its only and constant aim. All special theoretic conceptions have become positive and the general conceptions tend to become so. Metaphysical and theological political theory was, according to Comte, marked by two considerations: (*a*) in its method, imagination outweighed observation; (*b*) in its general ideas it had a purely abstract conception of social organization, which was regarded as independent of the state of civilization; and it regarded progress as not subject to law. By reversing these points of view, Comte laid the foundations of his theory of government. He held that we must introduce into political science, as into all other sciences, the preponderance of observation over imagination. In order to fulfil this fundamental condition, social organization must be conceived of as intimately connected with the state of civilization and determined by it, and progress must be considered as being subject to an invariable law based upon the nature of things.¹ The search for the best possible government, taking no account of the state of civilization, is, according to Comte, of the same nature as the search for a panacea applicable to all maladies and all temperaments. Scientific political theory rejects both the idea of popular

¹ 4 *System of Positive Polity*, 553.

sovereignty and the idea of equality. The word "right" should be excluded from the language of political science; it represents an immoral and subversive idea. Everyone in the positive state has duties, duties towards all; but rights in the ordinary sense can be claimed by none. Whatever security the individual may require is found in the general acknowledgment of reciprocal obligations; this gives a moral equivalent for rights hitherto claimed, without the serious political dangers which they involved.

Most of Comte's political ideas were not original with him; his debt to Condorcet, Maistre and others has often been pointed out. Comte believed that Montesquieu was the first to anticipate the principles of the positivist political theory although he believed that Montesquieu, in several respects, had exaggerated greatly the influence of climate.¹ But irrespective of the question of Comte's originality, his influence on the social and political theorists who followed him was large. In no department of social theory do we fail to encounter his influence; in particular, he has played, as we shall see, a large part in shaping the present-day sociological attitude towards law.

Herbert Spencer, in his autobiography,² has related how, in the last days of 1857, at about the age of thirty-seven, when he was collecting, revising and publishing a number of essays, he was impressed with the kinship and connections between the ideas of his various articles. Suddenly there came to him the thought that the concrete sciences at large—astronomy, geology, biology, psychology and sociology—should have their various classes of

¹ 4 *System of Positive Polity*, 569.

² 2 *Autobiography* (1904), 14.

facts presented in subordination to the universal principle of evolution. Clearly, it seemed to him, these sciences form a connected and unified aggregate of phenomena ; and clearly, therefore, they should be arranged into a coherent body of doctrine. Thereafter, he set himself the formidable task of composing the volumes which would relate all departments of knowledge, which he believed were separated only by conventions, to the theory of evolution. This theory he stated in the following celebrated formula :

Evolution is an integration of matter and concomitant dissipation of motion : during which the matter passes from an indefinite, incoherent homogeneity to a definite, coherent heterogeneity ; and during which the retained motion undergoes a parallel transformation.¹

For the next forty-odd years Spencer carried out his plan of demonstrating the universal application of this formula. Here we are concerned only with his application of it to law.

Throughout the five thousand and more pages of the *Synthetic Philosophy* there are many incidental discussions by Spencer of problems which are a part of the domain of the law. His analysis of many of these problems is often of immense interest and value to legal thinkers and their systematic correlation and extraction from the pages where they are now buried would be a useful service. But in the three volumes of the *Principles of Sociology*,² over the composition of which he laboured for twenty years, Spencer set forth, with order and at length, his theory of law ; and it is upon this scrupulous

¹ *First Principles* (1882), §145.

² (1887-97). Other works of Spencer which contain much valuable material for legal students are *First Principles* (1882), *Justice* (1892), *Social Statics and the Man versus the State* (1892), *Data of Ethics* (1879)

presentation of his legal views that the following summary will, for the most part, be based.

Spencer's theory of the origin of law is, in essence, an adaptation to the field of the law of his well-known "ghost theory" of the origin of religion.¹ Human conduct, Spencer held,² is controlled much more by inherited laws than by the laws which the living make; law is therefore "mainly an embodiment of ancestral injunctions." This implies a tacit ancestor worship. Among primitive people, and even to some extent in advanced cultures, there are two classes of accepted injunctions: (a) those tacitly accepted from seniors and through them from remote ancestors; (b) those consciously attributed to supernatural beings. This latter class arises from the practice among primitive peoples of appealing to ghosts, and to the gods evolved from ghosts, for directions in special cases; we see its origin also in the belief of more advanced peoples that God will indirectly give judgment in such practices as the trial by ordeal. Law in early societies is regarded as having a sacred origin; it therefore acquires stability, and its rules, compared with rules recognized as having a natural origin, develop too great a rigidity; this makes them unadaptive to new conditions and impedes progress; at this point "legal fictions" appear, by the aid of which nominal obedience is reconciled with actual disobedience, thus enabling the law to solve the great problem of the unification of the principles of stability and change.

In early societies rules of law have a religious sanction, they are therefore unchangeable and their maintenance presupposes implicit obedience; disobedience

¹ 1 *Principles of Sociology*, 440.

² 2 *Principles of Sociology*, §§29-35.

becomes the blackest crime. In legal development, laws of recognized human origin, having first become differentiated from laws of supposedly divine origin, subsequently become re-differentiated into those which are sanctioned by the ruler and those which are sanctioned by the aggregate of private interests; the latter, in the course of social evolution, tends more and more to absorb the former. Finally, it is plain, according to Spencer, that the systems of laws belonging to the successive stages are severally accompanied by the sentiments and theories appropriate to them; and that the theories of the present day, which reflect the existing compromise between militancy and industrialism, will be succeeded by the ultimate theory, "in conformity with which law will have no other justification than that gained by it as a maintainer of the conditions to complete life in the associated state."¹ Here, Spencer said, he might "enter on the development of laws, not generally, but specially; exhibiting them as accumulating in mass, as dividing and subdividing in their kinds, as becoming increasingly definite, as growing into coherent and complex systems, as undergoing adaptations to new conditions."² However, present requirements were satisfied, he felt, by the results above set forth.

This, in brief, is Spencer's theory of law. In addition, he worked out in detail the development of the judicial system from its close alliance at the outset with military action to its evolution into a centralized and heterogeneous judicial organization.³ Similarly he saw, in the growth of the legal class as exemplified in its

¹ 2 *Principles of Sociology*, 537.

² 2 *Ibid.*, 534.

³ 2 *Ibid.*, §§522-8.

divergence from the clerical class and its subsequent division into barristers and solicitors and even into further classes, that the process of integration has been accompanied by progress in definiteness.¹ Even statutes bore witness to the universal law of evolution.² In the successive stages of legislation, he held, statutes are gradually rendered more specific in their applications to particular cases. Each new law beginning as a vague proposition is, in the course of enactment, elaborated into specific clauses; and further, only after its interpretation has been established by judges' decisions does it reach its final definiteness.

Spencer's introduction of biological principles into the field of sociology has been amply criticized and there is no need here to add to a literature already over-weighted.³ Indeed, much of the criticism which has been directed against Spencer on this score is, for all its acuteness in laying bare hidden implications and inconsistencies, largely beside the point. There is no question, irrespective of the depth of the analogy, that biological phenomena and social phenomena are analogous. But the real count against the analogy is not a denial that there is one, which is absurd, but it is the fact that its application has not so far led to the fruitful results which we have the right to expect from the claims of its proponents. In Spencer's case, its application gave him a framework on which he was able to co-ordinate more social facts than any of his predecessors. If to-day we

¹ 3 *Principles of Sociology* §§693-8.

² *First Principles*, §134.

³ For criticisms see Barker, *Political Thought in England* (1915), Chapter IV, Barnes, *Representative Biological Theories of Society*, 17 *Sociological Review* (1925), 120, 18 *ibid.* (1926), 100; Patten, *The Failure of Biological Sociology*, 4 *Annals Amer. Acad. Polit. and Social Science* (1894), 619; Sorokin, *Contemporary Sociological Theories* (1928), Chapter IV.

deny the truth of many of his conclusions, we at least admit the element of positive worth in his contention that the interpreter of social phenomena who ignores biological principles does so at the sacrifice of his contribution. Modern anthropological research has made it abundantly clear that the custom of ancestor worship is by no means universal and that it is the exception rather than the rule.¹ Nevertheless, the student of law, although unwilling to admit the truth of Spencer's outline of legal development, does recognize the principle that legal institutions develop as other social institutions develop and that the law is not merely a body of formal rules possessing objective validity but is an institution the development of which is an inseparable part of the social process.

Lester Ward,² the founder of the psychological movement in sociology which has so materially influenced contemporary jurisprudence, emphasized, in contrast with Spencer, the importance of the conscious control of the social process. Social development, he held, was the product of two agencies: social forces, which are blind impulses of nature and obey mechanical laws, and social teleosis, or the conscious control by the rational faculty of man of the forces of nature. He believed that social development must always remain on a comparatively low plane unless raised to a higher level by this

¹ Hopkins, *Origin and Evolution of Religion* (1923), 80.

² It is interesting to note that Ward, himself a lawyer, had a low opinion of the legal profession. He thought that its general characteristic was one of systematic deception. "I use to smile", he wrote, "when I heard good and simple country dames say that lawyers lived by lying, and I 'studied law', acquired that profession, and was duly admitted to the Bar. But long before the end I had learned that the good country dames were right and I was wrong. I was openly taught by the Senior Professor that my business was to gain my case, and that I was not to be the judge of the justice of the case. That was matter for the judge. I need scarcely add that I have never pleaded a case." *Pure Sociology* (1911), 488.

directive agent.¹ Ward made this proposition the basic principle of his comprehensive system of sociology and applied it generally in his analysis of society. Here we are concerned with his view of the state, law, and legislation, and the extension of this principle to them.

Ward viewed the state, which he held was the product of an evolutionary process in society, as the most important step taken by man towards the conscious control of society.² He summarized his famous theory in the following paragraph :

We thus see that the state, though genetic in its origin, is telic in its method ; that it has but one purpose, function, or mission, that of securing the welfare of society ; that its mode of operation is that of preventing the antisocial actions of individuals ; that in doing this it increases the freedom of human action so long as it is not antisocial ; that the state is therefore essentially moral or ethical ; that its own acts must necessarily be ethical ; that being a natural product it must in a large sense be representative ; that in point of fact it always is as good as society will permit it to be ; that while thus far in the history of society the state has rarely performed acts that tend to advance mankind, it has been the condition to all achievement, making possible all the social, industrial, artistic, literary, and scientific activities that go on within the state and under its protection. There is no other human institution with which the State can be compared, and yet, in view of all this, it is the most important of all human institutions.³

As the basis of his theory of law, Ward adopted the supposition of Gumplowicz⁴ and Ratzenhofer⁵ that progress comes through the conflict of groups ; this, he believed, was " without any question the most important contribution thus far made to the science of sociology."⁶ Progress through race struggle followed, according to

¹ Op. cit. supra p. 141, note 2 at 463

² Ibid., 551.

³ Ibid., 555.

⁴ *Der Rassenkampf* (1883).

⁵ *Die Sociologische Erkenntnis* (1898).

⁶ Op. cit. supra p. 141, note 2 at 204.

Ward, a natural order. First, when the boundaries of races have been pushed forward until they meet or overlap war usually results and the race with superior weapons or greater strategic abilities conquers ; the other race drops into the position of a conquered race ; secondly, the two races thus brought into close contact are usually so unlike that no assimilation is possible and there thus originates the caste system ; thirdly, there is a gradual mitigation of this condition resulting in a state of great individual, social and political *inequality*. The fourth step is the development of law and the origin of the idea of a legal right.

The difficulty, cost, and partial failure attending the constant and unremitting exercise of military power over all the acts of the conquered race, ultimately becomes a serious charge upon the conquering race. For a while, flushed with the pride of victory, this race persists in meting out punishments to all offenders against its authority, but sooner or later such personal government grows wearisome, and some change is demanded. It is found that authority may be generalized, and that rules can be adopted for the repression of certain classes of acts, such as are most frequently committed. When this is found to be economical, still larger groups of conduct are made the subject of general regulation. By the continued extension of this economical policy a general system of such rules is ultimately, though gradually, worked out, and the foundation is laid for a government by law. So long as the law is not violated a certain degree of liberty is conceded to the subordinate race, and the performance of acts not in violation of law comes to be recognized as a right.¹

The fifth step is the origin of the state, under which all classes have rights and duties ; sixth, from the mass of heterogeneous elements constituting the state a new social structure—a people—is created ; and seventh, when all past animosities have been forgotten the sentiment of patriotism develops and a nation is formed.

¹ Op. cit. *supra* p. 141, note 2 at 206. See also pp 30, 275-6, 349.

At the time Ward put forward his theory of law, he also advanced the notion of the group sentiment of safety. Ward believed that the advent of reason tended to increase the egoistic activity and waywardness of the individual and also to check the performance of the functions necessary to the life of the species. As a counterbalance to individual reason, which tended to destroy the race, there grew up along with it a sort of group reason, which resulted in a system of social control equipped with the machinery of coercion necessary to hold the refractory and recalcitrant elements in check.

It established an array of sanctions and ultimately a system of regulative edicts, rules, penalties and conditions, supported by a body of specially appointed persons to whom were entrusted their enforcement. All these were crystallized into customs and surrounded by ceremonies and rites.¹

Ward regarded law as one of the items comprising the group sentiment.

Law in its simplest expression is merely a sentiment like religion. It may be called the sense of order in society. But out of it grew or developed the whole system of jurisprudence, which is therefore a derivative institution, and law bears the same relation to the court that religion bears to the church.²

Ward's theory of legislation, which he repeated many times in the course of his works, was an application of what he termed the principle of attraction. Legislators, he believed, should be persons of recognized ability, fully acquainted with the principles of sociology and particularly with the principle of attraction. This principle, in conjunction with the law of parsimony or

¹ Op. cit. supra p. 141, note 2 at 134.

² Op. cit. supra p. 141, note 2 at 187.

the law of the greatest gain for the least effort, will show them that mandatory and prohibitory, and indeed penal legislation generally, is expensive and unnecessary and that the only cheap and effective way to control social forces and to cause individuals in society to perform beneficial acts is to offer such inducements as will in all cases make it to their advantage to perform such acts. Legislation would be worked out in advance by a series of exhaustive experiments in what would in reality be a sociological laboratory.¹

There is little that can be said in the way of exact criticism of Ward's theory of social telesis or of his exalted view of the state. Social development, to some degree, *may* be the product of man's rationality although we cannot prove it in any satisfactory manner; but in any event the idea of social telesis is the foundation of the first assumption of contemporary legal thought, that progress in making the law a more efficient instrument of society can come about through man's efforts and need not wait upon the unforeseen operation of social forces. Whether or not Ward's theory of the state is regarded as satisfactory is probably in the last analysis a matter of temperament; it is largely in accord with the important contemporary view, exemplified in the political philosophies of the Fascist and Soviet dictatorships, which finds in the state an instrument for the realization of vital social aims; it is directly opposed to the pluralist view which regards the state as one, but only one, of the important social institutions. Ward's theory, which he borrowed from Gumplowicz and Ratzenhofer, that law originated in group conflict is not borne out by the

¹ *Applied Sociology* (1906), 337. See also *Dynamic Sociology* (1883), I, 37, 42, II, 545, 608, *Pure Sociology*, 370.

facts and contemporary anthropology has done much to undermine it. The theory implies, furthermore, that in a comparatively advanced stage of social development—that is, when a race has progressed sufficiently to have a highly organized military system, capable of keeping another race in a state of subjection—the conquering race is without a system of rules of conduct which properly can be designated law. This plainly is a contention which would be extremely difficult, if not impossible, to establish. The view that law is a branch of the group sentiment of safety is hardly more than an interesting hypothesis. Similarly, the theory of attractive legislation belongs to some more distant day when ultimate social ends have been clearly envisaged and agreed upon, and the social structure stabilized. Legislatures cannot pass positive laws directing individuals to pursue certain courses of conduct without first knowing what ends in the social life are most desirable. Even although Ward's particular suggestions are in the main invalid, his emphasis upon the psychological factor as one of the principal forces operating in society is immensely fruitful and constitutes for legal thought a contribution of real value.

Thus, to summarize briefly, the four sociologists who with propriety may be regarded as the chief modern founders of their subject—Montesquieu, Comte, Spencer and Ward—all approached legal phenomena from different angles but all nevertheless put forward conclusions which are to-day an essential part of a sound sociological legal theory. This is not to say that these conclusions were advanced for the first time or given their final statement by these writers ; it is merely to say that because of the historical position of Montesquieu,

Comte, Spencer and Ward in the field of sociology, certain propositions with respect to the analysis of social phenomena are conveniently associated with their names. Many of the geographico-political correlations put forward by Montesquieu are regarded to-day with distrust, but in view of the scanty material available at that time this is at bottom no criticism of him ; but his basic proposition—that in the study of the social process geographical and other environmental factors must be considered—is firmly established and any inquiry which ignores it is incomplete. Similarly Comte's insistence upon the observational method in politics and law as opposed to revelation and eighteenth century abstract rationalism is now accepted as a commonplace although it cannot be said that Comte was a faithful follower of his own method or applied it with marked success to particular problems. To Spencer we are indebted for his insistence upon the importance of the biological factor in the social process and his demonstration of the social character of legal development. To Lester Ward we owe the establishment of the psychological approach in social analysis. To-day we are not inclined to accept the work done in detail by Spencer and Ward in the domain of the law, although we cannot fail to recognize the intrinsic soundness of their main conclusions.

When we turn to the modern sociological analysis of legal phenomena we find that it has followed in the main two principal paths. There is, first, the view of those sociologists who, eschewing an independent analysis, are content to accept the theory of law held by lawyers. Second, there is the view of the sociologists who have essayed an independent investigation and whose

theories of law are roughly denominated by the term "social control".¹

There is little that need be said with respect to the work of the first group. For the lawyer, their discussions are neither new nor helpful. So far as sociologists or other students are concerned, I am inclined to think their work is misleading. For the most part the discussions of these sociologists are based upon the work of one man, generally Pound, although sometimes it is Holmes or Cardozo, and occasionally in addition there are shy references to Carter, Maine, and even Duguit and Kohler. However excellent these selections may be, as single choices, the result is as one-sided as would be an exposition of sociology through the summarization of the views of, say, MacIver or Oppenheimer or of economics through Keynes or Maurice Dobb. This, it should be added, is not to imply that it is not highly desirable for sociologists before attempting their own analyses to familiarize themselves with the work done by lawyers. This is precisely what characterizes the work of many of the first-class sociologists and gives it an importance which lawyers should not ignore. Nor should these remarks be taken as a criticism of the work of such sociologists as Hobhouse, who, so far as can be judged, have, by independent analysis, reached substantially the position already occupied by legal students. Thus Hobhouse concludes that "Law is the rule which a court will enforce"²—a conception of law previously

¹ It is perhaps superfluous to add that we are not concerned here with the work of such jurists as Pound, Ehrlich and Wurzel who, with a sociological orientation, apply the name "sociological jurisprudence" to their studies. In connection with the present point the inquiry is limited to the work of professional sociologists.

² *Social Development* (1924), 47. Cf. his other works, *The Elements of Social Justice* (1922), 102 et seq., *Social Evolution and Political Theory* (1911), 191, *Morals in Evolution* (1906), Chapter III.

advanced by Holmes¹ and Cardozo.² Analyses of this type are welcome, not because they add to legal knowledge, which of course they do not do, but because they give independent confirmation.

But the sociologists of the first group are in the minority and the main development of sociological legal ideas is due to those sociologists whose starting-point has been the conception of law as an instrument of social control. The term social control was first given currency by the American sociologist E. A. Ross in a series of articles contributed to the *American Journal of Sociology* between March 1896 and May 1898, and subsequently published with additions in 1901 in his book *Social Control*. Ross did not define the term but from its usage it is clear that it means, in its sociological, as distinguished from its economic sense, the influences brought to bear by society upon individuals or groups.³ Under this wide conception of the term, it is apparent, as Park and Burgess have said, that "all social problems turn out finally to be problems of social control."⁴ In the beginning sociologists were content to do little more than point out that law was a form of social control, but later analyses have been more precise and have passed far beyond this early stage. A brief history of the development of the idea will indicate the steps leading to the modern position.

Professor Ross's contribution (as the first sociologist to write of law as a method of social control) lies in his demonstration of the importance of the role of law in

¹ *Collected Papers* (1920), 173. Cf. Cohen, *Ethical Systems and Legal Ideals* (1933), 11.

² *The Growth of the Law* (1924), 52.

³ *Social Control* (1901), Chapter VIII.

⁴ *Introduction to the Science of Sociology* (2nd ed., 1924), 785.

the ordering of human life and not in his discussion of the nature of law itself. He concludes that law, when compared with the other methods of control available to society—public opinion, belief, suggestion, ceremony and so on—is “the most specialized and highly finished engine of control employed by society”¹ and that it is the “soul” which holds civilization together.² Later sociologists, with this conception as the starting-point, have attempted to define the end of law with more exactness. Thus Worms conceives of law as “a group of rules the application of which ought to ensure the normal functioning of society.”³ Sumner and Keller draw a distinction between the mores and law; they view law as “a sort of crystallization or precipitation of the mores.”⁴ They believe that society under the strain of ceaseless competition, if it is to survive, must preserve discipline and order in the conduct of its members. The more intimate and scattered questions of conduct are regulated by the mores. These take care, for example, of the essential aspect of marriage, which is the personal and not the legal relation. The necessary adjustments between husband and wife, which involve good-breeding, self-sacrifice and other qualities, the law cannot touch. But the more external cases, and classes of cases, are matters for legal regulation. Miss Follett endeavours to enlarge the purpose of law beyond the mere securing of interests :

Law cannot decide between purposes, set their various values, secure interests. Its task is to allow full opportunity for those

¹ Op. cit. supra p. 149, note 3 at 106.

² Op. cit. supra p. 149, note 3 at 123.

³ 3 *Philosophie des Sciences Sociales* (1907), 210.

⁴ 1 *The Science of Society* (1927), 633. Cf. *ibid.*, §181 and Sumner, *Folkways* (1927), §§62, 63.

modes of activity from which an integrating purpose may arise, and such purpose tends to secure itself. The function of law is not merely to safeguard interests; it is to help us to understand our interests, to broaden and deepen them. Law can never "protect" life, it can only find a legitimate place among life's many activities.¹

Professor Ellwood, although he holds that law is the most important of all the means of social control,² concludes that by itself it is inadequate, that it cannot penetrate deeply enough to secure the highest type of social order.³ From his point of view it represents the minimum rather than the maximum of control which is necessary for the harmonization of group life; it signifies what the group will tolerate. Lindeman, following the rules of definition laid down by Ogden and Richards,⁴ defines law as "a conscious means of evaluating interests, assumed by the state in behalf of general justice"⁵ and concludes that "the law controls group conduct as a means of establishing the means as well as the ends of justice."⁶

In addition to those writers who have developed in general terms the notion of law as a method of social control, three sociologists—Bentley, MacIver and Davy—equipped, in addition to their sociological learning, with a wide knowledge of legal theory, have attempted to work out a more embracing sociological approach to law. Bentley, after concluding that law is not a resultant

¹ *Creative Experiences* (1924), 292-3. Cf. *The Modern State* (1918), Chapter XV.

² *Sociology and Modern Social Problems* (1924), 23.

³ *The Psychology of Human Society* (1927), 396-401.

⁴ *The Meaning of Meaning* (1927).

⁵ *Social Discovery* (1925), 241. Mr Lindeman defines an interest thus: "an interest symbolizes something which all the members of the group want, need, desire or wish for, and therefore strive to acquire." Ibid., 216. See 207 for a definition of "group".

⁶ Op. cit. *supra* note 5 at 242.

of government, but rather that it is government, only from a different angle, holds that

The law at bottom can only be what the mass of the people actually does and tends to some extent to make other people do by means of governmental agencies. (I repeat. I am not speaking as the lawyer speaks when he looks out of his window upon society. I am speaking of society with the lawyer included as part of the process.) The law, then, is specified activity of men—that is, activity which has taken on definite social forms—embodied in groups which tend to require conformity to it from variant individuals (these themselves appearing in groups and having their variant actions valued and judged only as affecting groups), and which have at their disposal, to help them compel these variants to adapt themselves to the common type, certain specialized groups which form part of the governing body of the society, that is, certain organs of government.¹

Bentley analyses the conception of law as activity in its relation to many phases of social life. In this connection his treatment of the distinction between criminal and civil law is of interest.

It is not a distinction that is useful here. Indeed it is a distinction of a kind which is very important for us to break down and obliterate. It is a lawyer's distinction, having to do primarily with "process" in the technical legal sense, and while it is an important distinction practically, even in the law-books it breaks down theoretically on the test of penalties, and on every other test as well. From our point of view there is no law that is fundamentally more "public", none that is more private, than any other. The most insignificant suit between two petty disputants over a contract is dealt with socially on the basis of great group interests which have established the conditions and the bounds for it. All law is social.²

MacIver has sketched a sociological theory of law which attempts to differentiate clearly between custom and law.³ Basically, he regards law as a method of social

¹ *The Process of Government* (1908), 276-7.

² *Op. cit.* *supra* note 2 at 277.

³ *Society. Its Structure and Changes* (1931), 251-4, 272-7, *The Modern State* (1926), Introduction and Chapter VIII.

control or, in his terms, as a "regulative principle" of society which makes for coherence and stability. But he goes further than this. Specifically, he defines law in the Holmes-Cardozo-Hobhouse terms as "the body of rules which are recognized, interpreted, and applied to particular situations by the courts of the state."¹ He points out that the social structure, although subject to incessant change, would not be a structure at all if it were not sustained by the operation of certain norms of conduct or codes which ensure some regularity of behaviour on the part of the members of a community. Under certain more or less rare conditions these codes are imposed by rulers or by traditional inheritance, but generally they represent the accommodation of the group as a whole to the necessities of common living. The rules and sanctions of civilized communities, or the social consequences of nonconformity to the community code, are of diverse kinds and more or less differentiated. Club rules, factory regulations, professional codes, the dictates of fashion—as well as law—all tend to ensure uniformity of behaviour. Law is distinguished from other codes in that it alone in a modern society has behind it the authority of unconditional enforcement. This is what MacIver believes clearly differentiates it from custom.

"Law" derives from various sources, including custom, but it becomes law when the state, which means in the last resort the courts, is prepared to enforce it as a rule binding on citizens and residents within its jurisdiction. Inadequate definitions of law often create confusion on this subject . . . Thus Pollock points out that legal enforcement is a relatively modern phenomenon. "If we look away from such elaborated systems as those of the later Roman Empire and of modern Western governments, we see that not only law but law with a great deal of formality, has

¹ *Society*, 272.

existed before the state had any adequate means of compelling its observance—and indeed before there was any regular process of enforcement at all.” What this fact really means is that law under such conditions was not fully differentiated from customary and ethical codes, but we can define anything only as it appears when it is sufficiently differentiated to reveal its distinctive nature.¹

Professor MacIver adopts as the end of law both Jhering’s² view and the modern theory³: he conceives of it as guaranteeing life in society and also as existing to secure social interests.

The great functions of law may perhaps be summed up as being (1) the maintenance of a fundamental order within which men shall find security and the common conditions of opportunity, and (2) the adjustment of those conflicts of interests between individuals or groups which they cannot settle for themselves or in settling which they encroach on the interests of others.⁴

Davy’s studies, in which we find perhaps the most notable sociological contribution towards the analysis of particular legal problems, stress what is essentially the functionalist approach. The origin and nature of juridical notions can never, he believes, be explained as the image of reason or of human instincts in general. They must be considered as objective expressions of collective and individual life, which are formed, unformed and transformed in the course of the history of societies and under the action of assignable causes. The fundamental categories of public and private law in reality represent progressive acquisitions of civilization.⁵ In elaboration of this point he has published two important studies of specific legal institutions or concepts. In the first, he dealt with the contract institution in its early

¹ *Society*, 272.

² *Law as a Means to an End* (1913), 330.

³ Pound, *An Introduction to the Philosophy of Law* (1922), 90-8.

⁴ *Op. cit.* *supra* note 1 at 275.

⁵ *Sociology*, 36 *The Monist* (1926), 456, 473-4.

manifestations in rude societies, concluding that the first specific contractual form was not to be found in the institution of marriage but in the potlach.¹ The second study was devoted to an analysis of the concept of sovereignty, which he traces from its beginning in totemic society through its further development in tribal communities to its culmination in national society.² Davy's work is distinguished by a fine caution, and although some of his conclusions—such as his classifications of societies—as he himself would insist, must be regarded as tentative, his work nevertheless represents perhaps the high water mark of sociological-legal synthesis.

It is clear from the foregoing outline that the sociological attempt to analyse the nature of law is still incomplete. Nevertheless, if uniformity of opinion may be taken as a criterion, the foundations of the sociological approach have been laid. In the practically unanimous opinion of sociologists the fact that law is a method of social control gives to it its essential characteristic. Here the positive gain is that the social character of law, as opposed to its rationalistic or formal side, is emphasized. But sociologists are as keenly aware as are jurists that the concept of law as a method of social control, if it is to be utilized as the basis of a general theory of law, must be further developed and made more precise. As it now stands, it is only the shadow of a theory and not a theory itself. It is true that Professor MacIver, as we have seen, has attempted to formulate the concept in more specific and utilizable terms but he

¹ *La foi jurée* (1922), 150.

² *Elements de sociologie* (1924). Cf. Moret and Davy, *From Tribe to Empire* (1926).

has at the same time endeavoured to salvage as much as possible from the more advanced legal theory. This has led him into difficulties. In primitive society, as he recognizes, the essential characteristics, from his standpoint, which distinguish law from custom are lacking. To be consistent, he must therefore deny that the fundamental rules of primitive society governing life, property and the structure of kinship are, as Malinowski¹ terms them, legal or juridical. These rules, Professor MacIver insists "are primitive *equivalents* of our legal institutions."² But to designate these rules "equivalents" is in reality, from the standpoint of sociology, to beg the question. The rules are not rules of custom; in primitive society they fulfil the same function that rules of law fulfil in advanced society; how then are they to be differentiated from the rules of law in advanced society? Professor MacIver answers: By the enforcing agency; rules in our society are enforced by courts; rules in primitive society are not enforced by courts since there are no courts or court-equivalents. This distinction would seem to be too slight to find general acceptance as the basis of a theory of law. Either a more profound social difference will have to be uncovered or the practice of regarding them as distinct will have to be abandoned. But this criticism of Professor MacIver's development of the idea of social control is not directed at the general sociological theory of law. The general concept is a significant contribution to legal thought and, although it has so far received its most discriminating analysis at the hands of the lawyers, its further elaboration by sociologists, aside from the possibility of their reaching

¹ *Crime and Custom in Savage Society* (1926) Supra p. 18.

² Op. cit. supra p. 152, note 3 at 255. (MacIver's italics.)

a final solution of the problem, will counterbalance the inevitable tendency of legal theory to become rationalistic and formal and will require lawyers to take a greater account of the social setting of law, however helpful traditional juristic methods may be in the settling of immediate cases.

(b) The Sociological Method in Law

Sociologists have devoted as much effort to the ascertainment of the "proper method" to be utilized in sociological research as they have expended on the definition of the word "sociology" and with as little success.¹ All methods—the Socratic, historical, case, analogical, statistical—have been employed by the sociologists and each has had its warm champions. To-day careful sociologists are in agreement that no special method of research is peculiarly appropriate for the investigation of social phenomena but that all methods of research, if used with the necessary scientific caution, are equally available to the worker in this field.

In the field of the law an increasing number of jurists, influenced by sociological thought, have adopted as an auxiliary tool in legal analysis, what is termed a sociological approach or method. This method is well known and does not here call for any extended discussion. It means simply that the worker in the field of the law, whether he be analyst, historian or judge, approaches the law in its relation to its social setting and does not regard it as an absolute existing alone, in Cole's² phrase, in a "circumambient void". To ask

¹ On method in sociology, see Odum and Jocher, *An Introduction to Social Research* (1929), Lundberg, *Social Research* (1929), Bernard, *The Development of Methods in Sociology* (1928), 38 *The Monist*, 292, Cohen, *Reason and Nature* (1931), Book III, Chapter I.

² *Social Theory* (1920), 81.

the jurist to take account of social facts in the passage of new legislation or in the enforcement of existing rules is not to ask him to cease being a jurist and to become a sociologist. It is only a question of the now obvious fact that the jurist who adopts the sociological method adds to his equipment a tool which, if properly used, will increase the insight and power of his legal analysis. In contemporary jurisprudence, the sociological method, if not in extensive use, is nevertheless firmly established. Maitland and Holmes, two of the brightest names in the history of Anglo-American law, owe much of their lustre to the fact that the sociological method was an ever-present factor in the approach of these two scholars to the problems of jurisprudence. From the famous briefs of Mr Justice Brandeis in *Muller v. Oregon*¹ and in *Ritchie v. Wayman*² to Holdsworth's *History of English Law*, the sociological method has time and again demonstrated its value to the jurist. In the field of law enforcement, Mr Justice Cardozo³ has described the advantageous transformations which this method has wrought in the legal view of property, liberty and public policy; and *Lochner v. New York*⁴ and *Adkins v. The Children's Hospital*⁵ are still melancholy reminders of the disasters which await the law if the method is ignored. The sociological method, in short, is one in which legal students, as they continue to divest law of its transcendental and immutable characteristics, will find with increasing use a valuable auxiliary in law making and legal analysis.

¹ 208 U. S., 412 (1908).

² 244 Ill., 509, 91 N. E., 695 (1910).

³ *The Nature of the Judicial Process* (1921), Chapters II and III

⁴ 198 U. S., 45 (1905).

⁵ 261 U. S., 525 (1923).

(c) Sociological Analysis of Socio-Legal Institutions

The scientific analysis of social questions, which perhaps is found for the first time in its modern form in Malthus,¹ although in substance it goes back at least to Heraclitus,² and which is the most important function of sociological work to-day, is distinguished by two purposes: first, the collection of facts; and, secondly, a disinterested examination of them. This means that social institutions are interpreted upon the basis of function and history; it means also that supernatural, rhetorical or word-magic, and purely logical interpretations, which are still widely employed in discussions of contemporary problems, are disregarded. Functionally, the aim of the sociologist is to study social institutions as they are found in different civilizations and at different levels of culture, and in relation to the actual conditions of social life. The fact that groups within society regard marriage as having a divine origin, or label a particular system of production and distribution "communistic", or believe that asceticism finds a justification in the chaste syllogisms of the Aristotelian logic, are of interest to the sociologist only in so far as these beliefs influence social behaviour; in forming his own opinion of the nature of marriage, the Communist system or asceticism, he gives such beliefs no weight. From the genetic stand-point, the sociologist is interested only in learning how a particular social institution has come to be what it is. He does not expect to find in the past solutions for the problems of the present. No amount of study of

¹ *An Essay on the Principle of Population* (1798).

² No one among the early Greeks was more vehement than Heraclitus in urging that authority of tradition should be repudiated and that all problems should be approached realistically. See Patrick, *The Fragments of Heraclitus of Ephesus* (1889), frags. 61, 111, 126, 130.

the Athenian democracy of the fifth century B.C. will reveal, sociologists insist, how a modern democracy should be organized. Nor is it the purpose of the sociologist, by demonstrating that a modern institution has its roots in an ancient and primitive custom, to show, as is sometimes thought, that the present-day institution is absurd and should be abandoned.¹ Each institution is examined on its merits independently of its antiquity or its newness.

From this position, sociologists have put forward many studies of domestic, political and economic institutions, associations and concepts with which the law is directly concerned. With respect to domestic questions, there are the studies of Calhoun,² Dealey,³ Parsons,⁴ Howard,⁵ Starcke,⁶ Goodsell,⁷ Reed,⁸ Mowrer⁹ and Gillette¹⁰ of the nature and place of the family in society; and the studies by Lichtenberger,¹¹ Groves,¹² Ogburn,¹³ Goodsell,¹⁴ Howard¹⁵ and Cahen¹⁶ of marriage and divorce. In the political field, sociologists have made notable contributions in many departments; they have formulated valuable theories with respect to the nature of the state, its origin and development, the classification and

¹ It is interesting to note that Sir James Frazer has gone to the opposite extreme in an effort to show the debt modern civilization owes to the savage. *Pryde's Task* (1909), *The Golden Bough* (single volume ed. 1923), 262.

² *A Social History of the American Family* (1919).

³ *The Family in its Sociological Aspects* (1912).

⁴ *The Family* (1906).

⁵ *History of Matrimonial Institutions* (1904).

⁶ *The Primitive Family* (1889).

⁷ *The Family as a Social and Educational Institution* (1915).

⁸ *The Modern Family* (1929).

⁹ *Family Disorganization* (1927).

¹⁰ *The Family and Society* (1914).

¹¹ *Divorce* (1931).

¹² *Social Problems of the Family* (1927).

¹³ Groves and Ogburn, *American Marriage and Family Relationships* (1928).

¹⁴ *Problems of the Family* (1928).

¹⁵ *Op. cit. supra* note 5.

¹⁶ *Statistical Analysis of American Divorce* (1932).

analysis of its forms, sovereignty, liberty and rights, the proper limits of state activity, and international relations.¹ Sociologists have been generally content to leave the analysis of economic questions to economists but at the present time they appear to be invading this field. Perhaps the most notable study in this connection is Davis's² *Contemporary Social Movements*, an encyclopædic survey of modern proposals for economic reconstruction. In addition, sociologists have contributed largely to our understanding of crime and the criminal, poverty, racial conflict and other allied subjects. It would serve no useful purpose to summarize here the views of sociologists on these topics. It is sufficient to call attention to the work which has been accomplished and to remark that the lawyer neglects it to his own disadvantage. To the modern lawyer or jurist this warning is no doubt unnecessary. Indeed, it would seem that the lawyer might, with tools borrowed from the sociologist, even surpass the work done in these special fields. Thus, the recent statistical study of divorce, by Marshall and May,³ represents the utilization of the most advanced methods of research, and also the furthest point to which the study of this subject has been carried.

(d) Social Change and Legal Change

Nineteenth century social thought, after the formulation of the theory of biological evolution, was dominated by a theory of cultural evolution. In Spencer's theory of law, as summarized above, we see one application of the theory. As biological evolution was apparently a

¹ The theories and views of sociologists with respect to these points are well summarized and analysed in Barnes, *Sociology and Political Theory* (1924).

² (1930)

³ *The Divorce Court* (1932)

linear advance, so cultural evolution was also believed to be a single line advance. Thus, in prehistory, where the conclusions were based on European reconstructions, we were supposed first to have had a stone age, then a bronze age, and finally an iron age; in the evolution of marriage, promiscuity was believed to have been succeeded by polyandry, polygyny or polygamy, which in turn was succeeded by monogamy; in economic activity man was believed to have been first a hunter, then a pastoral nomad, and finally an agriculturist; in the domain of art, the earliest examples are supposed to be realistic and then to pass by definite steps through conventionalized to geometric forms. This concept of the single line advance has now been generally abandoned by sociologists. As Goldenweiser,¹ Tozzer,² Boas,³ Kroeber,⁴ Lowie,⁵ and others have shown, it has no relation to the facts. Thus in negro Africa, the only culture area, other than the European, where iron was known, the bronze stage did not occur and the iron stage directly followed the stone. Similarly, it is now generally agreed that marriage did not undergo the development indicated by the earlier anthropologists and that, to cite one instance, group marriage appears to be the outgrowth of a pre-existing state of individual marriage. Agriculture was practised by many tribes which had never known a pastoral stage, and hunting, while it is present in early stages, is also found in all subsequent stages. Conventionalization in art is a process which is frequently found, but it is far from

¹ *Early Civilization* (1922), 24-7.

² *Social Origins and Social Continuities* (1931), 14 et seq.

³ *The Mind of Primitive Man* (1911), 174.

⁴ *Anthropology* (1923), 7.

⁵ *Culture and Ethnology* (1917), 66.

being a universal one and there are instances of the development of realistic forms from geometric ones. It is now the general conclusion that realistic and geometric designs are equally primitive.

Now that the sociologists have abandoned the theory of social evolution, they are turning their attention to the cycles and fluctuations in cultural change. Here the most important studies, from the juristic point of view, have been the analyses by Ogburn and Chapin of the rate of change in the various parts of culture and the extent of their correlation.

Culture, in the classic definition of Tylor,¹ "is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." According to MacCurdy there can be no culture until the appearance of three physical factors—the hand, a brain fairly well balanced on a spinal column normally approximately erect, and stereoscopic vision. "Given this physical complex," he writes,² "a culture that we may call human would as surely follow as does the day the night." On this basis, although the record is admittedly fragmentary, he concludes that the dawn of culture occurred somewhere in the late Tertiary Epoch. Since the appearance of culture it has been, Ogburn³ and Chapin⁴ believe, in a continuous state of change. For the purposes of analysis they divide culture into material culture, non-material culture and adaptive culture. The material culture consists of factories, houses, machines, raw

¹ 1 *Primitive Culture* (1903), 1.

² 1 *Human Origins* (1924), 431.

³ *Social Change* (1922), 200.

⁴ *Cultural Change* (1928), Chapters VII, VIII.

materials, manufactured objects, foodstuffs and other material objects. The non-material culture consists of the ways of using the material objects of culture, from the simple technique in handling a tool to the larger usages and adjustments, such as customs, beliefs, philosophies, laws, governments. The adaptive culture is that portion of the non-material culture which is adjusted to material conditions. But the various parts of modern culture are not changing at the same rate. A change may occur in the material culture, but the corresponding change in the non-material culture does not occur for some time. During the period of the existence of this lag there may be said to be maladjustment. As a general rule material culture changes before the non-material culture and is the source of modern social changes. The growth of material culture is shown to be relatively faster than the growth of non-material culture ; the piling up of cultural lags may reach such a point that they may be changed in a wholesale fashion, as by revolution. This, in brief, is the theory of social change advanced by Ogburn and Chapin.

It is generally conceded that the various parts of culture do not change at the same rate and that this sometimes results in social maladjustment. But the theory that material culture is the source of modern social change, that changes in material culture require a shorter period of time than those in non-material culture, and so on, have been criticized on the ground that they are not supported by the facts.¹ The heart of the theory, however, is that different parts of culture change at different rates ; this is generally accepted. Here we are concerned with its application to the law.

¹ *Op. cit.* *supra* p. 126, note 2 at 743.

As a concrete test of the hypothesis, Professor Ogburn made a detailed study of workmen's compensation as a means of dealing with industrial accidents.¹ There were no state workmen's compensation laws in force in the United States prior to 1910. By the beginning of 1912, however, five of such acts were in force and by 1921 the number had increased to forty-two. Was there a change in the material culture at this time which produced a corresponding change in the adaptive culture or was there a cultural lag obtaining in this field prior to 1910? If there was a cultural lag, at what time can it be said that industrial accidents became sufficiently numerous that workmen's compensation laws should have been adopted? This is the question which Professor Ogburn sought to answer. He first analysed the growth of industry from the year 1790 to the year 1910 and found that in the two decades from 1850 to 1870 there was an appreciable beginning of industrial development. By 1870, three and a half million males were employed in industrial occupations in the United States and Professor Ogburn estimates that in this year there were about 100,000 accidents causing disabilities lasting four weeks or longer, and 350,000 accidents causing disabilities lasting less than four weeks. Professor Ogburn therefore concludes "that the year 1870 was hardly too soon to have developed workmen's compensation acts."² Here it would appear that there was a serious cultural lag which the common law had proved itself incapable of meeting and which therefore had to be solved by legislative action. Germany and Austria attempted to cope with the problem as early as the 80's

¹ Op. cit. *supra* p. 163, note 3 at 213 et seq.

² Op. cit. *supra* p. 163, note 3 at 227.

and other European countries quickly followed, but the United States was the last of the important industrial nations to promulgate legislation designed to eliminate the maladjustment. Altogether, in this country, the lag in the law was about fifty years.

Instances of cultural lag in the law are one of its striking characteristics to-day. In almost every department of the law there are examples of the failure of the adaptive culture to keep pace with the material culture. The failure of the law to cope with the problem of crime is an everyday illustration, and the one most frequently dwelt upon. But the inefficient functioning of the civil law is no less manifest. The law reviews, bar association reports, and the findings of special committees abound with discussions of the present defects in such fields as agency, contract, tort, corporations, utilities, bankruptcy, conflict of laws and taxation. Here the cause is not far to seek. Long before the trend towards urbanization had set in, the foundations of the law were laid in a civilization which was predominantly rural. Accordingly, the law was framed to meet the exigencies of a rural age. Our present civilization is, however, no longer rural but urban. The rapid growth of cities, which, in America, began about 1820, has produced an urban society which, in world history, is unique. A new set of conditions has arisen with which the law has had no experience. At present it is attempting to meet those conditions in accordance with the methods and terms of a rural civilization. It is endeavouring to solve the novel problems engendered by the unparalleled growth of industry and commerce with the tools fashioned to meet the needs of the petty trading civilization of the early

nineteenth century.¹ Here there is a cultural lag of large magnitude. In the course of time, no doubt, it will be eliminated and the law adjusted to modern economic conditions, just as American law after the Revolution sloughed its English feudal land-law skin and adapted itself to nineteenth century society. But while this cultural lag exists it is evidence of grave maladjustment.

Is the theory of social change and its corollary, the theory of cultural lag, an assistance to the jurist in adjusting law to the changed material culture? To this question the answer would seem to be that if the theory is of any assistance it is only of slight extent. Its greatest contribution lies in the fact that it has crystallized in concrete terms a situation which, while it was realized by the jurist, was inexpressible in definite scientific terms and was incapable of more or less precise measurement. This, at present, is as far as the theory goes. It provides the jurist with a concept of the situation, or a vocabulary in which to describe it, and perhaps a method of measuring in time periods the degree of adjustment between the various parts of law and the material culture. It offers so far only vague suggestions with respect to better adjustments or the elimination of cultural lags. It is only fair to add, however, that the solution of this latter problem is one to which the proponents of the theory have not yet devoted special effort.

CONCLUSION

To summarize the above conclusions, we have seen that jurists, at least since the early Greeks, in their

¹ For a discussion of the rural or pioneer, as he terms it, background of American law, see Pound, *The Spirit of the Common Law* (1921), Chapter V, *Criminal Justice in America* (1930), *passim*, *The Crisis in American Law*, 152 *Harper's Monthly Magazine* (1925), 152.

attempts to correlate social facts or to display their relations, have been practising sociology. In fact, these early jurists were probably the first sociologists. We have seen further that sociology would seem to have four points of contact with the law : (1) Sociologists, independently of the jurists, have developed their own theories of the nature of law. These theories are still in a formative stage and are of little practical use at the present time to jurists, in the sense that they are not capable of being utilized as the basis of a general theory of law, although they are having a marked influence on juristic thought. (2) Jurists have found that the so-called "sociological method" is a useful instrumentality in law making and legal analysis. (3) The sociological analysis of socio-legal institutions constitutes the great bulk of material to which the jurist can turn at once for assistance, particularly in the field of legislation. There is no evidence that this material has been unduly neglected by the jurists as a whole or that they have failed to evaluate it properly. (4) Sociologists have advanced a theory of cultural change which, as it is developed, may be of great help to the jurist in determining the lag between law and material culture, and in adjusting law to the changed material culture. At the present time the theory is not sufficiently developed to be of much practical use. In short, at certain points of contact between law and sociology the jurist must wait for further development ; at other points he is offered immediate assistance.

CHAPTER V

PSYCHOLOGY

MORE than a quarter of a century has now passed since the late Professor Munsterberg exposed what he regarded as the wilful indifference of the legal profession to the question of the application of psychology to law. "The lawyer and the judge and the juryman", he declared, "are sure that they do not need the experimental psychologist. . . . They go on thinking that their legal instinct and their common sense supplies them with all that is needed and something more."¹ Professor Wigmore, on behalf of the legal profession, accepted the challenge and in the pages of the *Illinois Law Review* destroyed Professor Munsterberg's rash and presumptuous little book—mercilessly, effectively, completely.² He concluded that psychology, at that time at any rate, had nothing to offer; when it did, he asserted, the law would welcome it.

Here, for lawyers and psychologists, the matter, until recently, has rested. In particular, psychologists of standing have been chary of venturing into the court room. The reception given Professor Munsterberg helped to chill any interest they may have felt in the psychological aspects of the legal process. In addition, there has grown up within psychology the doctrine that it should be "pure" or "scientific", that is, that it should be concerned exclusively with the ascertainment

¹ *On the Witness Stand* (1908), 10.

² *The Psychology of Testimony* (1909), 3 *Ill. L. Rev.*, 399.

of general psychological laws which unite particular psychological facts, and that it should not interest itself in the application of these laws. This belief, which has been and still is to a large extent a dominant one in psychology, was introduced, in the main, through the efforts of the late Professor Titchener. In an article published in 1914, the year following the one in which Professor Munsterberg ventured a further effort to make psychology practicable—this time, however, in the less sensitive field of industry¹—Professor Titchener distinguished between psychology as science and psychology as technology, that is, between “pure” psychology and “applied” psychology, and concluded that wise psychologists would forego all attempts to apply their subject to the problems of life.

“Science is defined by its point of view,” he held.² “The man of science takes his stand at the handle of the fan, and looks out along the sticks to an undefined periphery. Technology is defined by its practical end, the technologist, moving over the periphery, chooses and shapes the sticks which are to meet at the pivot that he has always held in view. . . . No technology is properly characterized as the application of a special science. Every technology is itself a special discipline, indebted (to be sure) to many sciences and to many other sources than science, but adding matter and method of its own, and rounding up all that it handles into a single whole. . . . Science and technology are alike in their free recourse to the established laws and approved methods of logic. Science is, on the whole, more rigorous than technology in this logical regard, not through any superior virtue in the man of science, but simply because the technologist, in the nature of the case, is a logical opportunist, working for results and towards a practical end, and therefore content to work in a logical twilight so long as results are forthcoming and progress can be reported.”

¹ *Psychology and Industrial Efficiency* (1913).

² *Psychology: Science or Technology* (1914), 84. *The Popular Science Monthly*, 39. Bertrand Russell has recently drawn a similar distinction between science as knowledge and science as technique. *The Scientific Outlook* (1931), *passim*.

The general point of view expressed by Professor Titchener is widely shared by workers in other fields, particularly in the domain of the so-called exact sciences. E. T. Bell,¹ a distinguished mathematician, has recently restated it with incisiveness and clarity.

In none of the scores of anticipations of fruitful applications to science was there any thought of what might come out of the pure mathematics. Guided only by their feeling for symmetry, simplicity, and generality, and an indefinable sense of the fitness of things, creative mathematicians now as in the past are inspired by the art of mathematics rather than by any prospect of ultimate usefulness. However it may be in engineering and the sciences, in mathematics the deliberate attempt to create something of immediate utility leads as a rule to shoddy work of only passing value. The important practical and scientific applications of mathematics are unsought by-products of the main purposes of professional mathematicians.

Underlying this conception of science is the belief, with which few would quarrel, that science finds its justification in the fact that it gratifies our intellectual appetites. Workers who have pursued their subjects with no other object than this in view have, under its stimulus of unlimited freedom, invariably produced more creative results—and in the end, perhaps, more useful results—than those who have intentionally conducted their researches for practical ends. But the question arises, when the research worker has established his conclusions and an occasion makes possible their practical application, who shall apply them. Here Professor Titchener would seem to have adopted an extreme position, the direct result of which may be attributed the failure of psychologists and legal students to co-operate in a field which, in considerable part, is common ground. The distinction between science and

¹ *The Queen of the Sciences* (1931), 2.

technology is a valid and useful one—when we think of technology as embracing such subjects as mechanical engineering, which draws for its material upon a score or more of different fields of investigation. In this sense, technology cannot properly be said to be the application of a special science. But when we are confronted with the circumstance of workers in one field of investigation turning for guidance or assistance to the conclusions established by workers in another field, as when psychologists adopt the results of the investigations of physiologists, a different situation arises. Here we have the application of a special science. It seems a commonplace to add that the physiologist, although his principal concern is with research, is the proper person, until the psychologist is sufficient master of the subject himself, to guide and advise the psychologist in the problem in which he needs assistance. Similarly, when a court lays down a rule of conduct which has a purely psychological content, it is no perversion of the method of science for the psychologist to determine whether or not the rule is psychologically valid. But the belief on the part of psychologists that it does constitute a perversion of scientific method, has been a real obstacle in the path of a synthesis of law and psychology at the points where they overlap.

This attitude need not, however, detain us. Psychologists first had to accumulate their facts and systematically set forth their principles before there could be any application. All the facts have not yet been amassed or all the principles formulated; that is a process which perhaps will never end. To-day, however, even the most cautious psychologists¹ are beginning to recognize

¹ See Dunlap, *Habits: Their Making and Unmaking* (1933) for a recent example of a research psychologist venturing into the field of application.

that enough has been accomplished in this direction to permit the application of psychological knowledge to certain fields of conduct without doing violence to scientific method. Whether or not psychology is now prepared to contribute materially to the advancement of legal knowledge is the subject of this chapter.

Psychology, as a science which offers fruitful contributions to law, has attracted far greater attention than any of the other social sciences, including even sociology. It cannot be said, however, that the bulk of the literature devoted to this point has advanced the synthesis of the two fields. It is a subject for which the ill-equipped, on the psychological or legal side, or both, have shown a predilection. The over-hasty generalizations and the discussions of psychological errors and faulty observations with which the literature abounds have not commanded the respect either of capable psychologists or lawyers. It is only within recent years that the subject has been approached in a productive and scrupulous manner ; but even to-day we are still at the threshold.

Psychology's primary contact with law lies in its possible substantiation or contradiction of the frequent psychological assumptions made by the courts in formulating legal rules of conduct. That is to say, when a court makes an assumption with respect to how individuals behave under particular circumstances it is making an assumption which the data of psychology may corroborate or contradict. A large part of the business of psychology is to ascertain how people generally conduct themselves in certain situations ; this is also, but to a much lesser extent, the concern of the law. If, for example, the courts decide that a dying declaration made by an individual, the manner of whose death is

being investigated in a criminal proceeding, is admissible because the solemnity of the occasion is likely to impel truthfulness, they are making an assumption more properly describable as psychological than legal. In the establishing of the rule, which is perhaps rooted in a custom which goes back at least to the twelfth century,¹ theological beliefs were perhaps a dominant factor. Psychology may or may not confirm the law's assumption but at least it would be wise for the courts to inquire what it has to offer. In many fields of the law the courts are making psychological assumptions, of which the admissibility of dying declarations is an example (though the frequency of such assumptions is not so great as some writers believe), which the present development of psychology makes it worth while for the law to collect and test in the light of such facts as psychology is now prepared to offer. Here there is an initial difficulty. The systematic collection of such assumptions is an impossibility and their final gathering will require the work of many hands. In the present chapter the discussion will be confined to examples which appear to be typical.

Analysis of legal liability begins with acts or non-action of human beings. The act of a human being initiates a train of events for the consequences of which legal responsibility may be imposed; similarly a human being by not acting fails to initiate a train of events and may be legally liable for the consequences. Psychological analysis of human beings has also as one of its starting-points the acts of human beings. Why do human beings act as they do? is a fundamental question

¹ 5 Wigmore, *Evidence* (2nd ed., 1923), 160 n. 1, cf. 5 Holdsworth, *Hist. E. L.* (1924), 183.

in psychology. In both law and psychology, therefore, it is important to know what an act is. For the law, the courts have stated that "the word 'act' signifies something done voluntarily, or in other words the result of an exercise of the will."¹ Writers on jurisprudence go into the matter a little more deeply. Austin² defines an act as a bodily movement which immediately follows a person's desire for it. To Holmes,³ "an act is always a voluntary muscular contraction, and nothing else." To Salmond,⁴ it is "any event which is subject to the control of the human will." For Holland,⁵ "'Acts', in the widest sense of the term, are movements of the will. Mere determinations of the will are 'inward acts'. Determinations of the will which produce an effect upon the world of sense are 'outward acts'. . . . Jurisprudence is concerned only with outward acts. An 'act' may therefore be defined . . . as 'a determination of will, producing an effect in the sensible world'. . . . The essential elements of such an act are three, viz. an exertion of the will, an accompanying state of consciousness, a manifestation of the will. . . . We may accept as sufficient for our purpose the definition of an act of will as 'the psychical cause by which the motor nerves are immediately stimulated', or as 'that inward state which, as experience informs us, is always succeeded

¹ *Wilson v. Nelson*, 183 U. S. 191, 212 (1901) (Dissenting opinion, Shiras, J.), *Duncan v. Landis*, 106 Fed., 839, 848 (C. C. A. 3rd, 1901), *Randle v. Birmingham Ry. Light & Power Co.*, 169 Ala., 514, 53 So., 918 (1910), *Y. & O. Coal Co. v. Paszka*, 20 Ohio App., 248, 152 N. E., 31, 32 (1925), *Jefferson Standard Life Ins. Co. v. Myers*, 284 S. W., 216, 218 (Tex. 1926). Cf. Pound and Plucknett, *Readings on the History and System of the Common Law* (3rd ed., 1927), 513.

² *Jurisprudence* (5th ed., 1911), 421.

³ *The Common Law* (1881), 91.

⁴ *Jurisprudence* (7th ed., 1924), 381.

⁵ *Jurisprudence* (10th ed., 1906), 102.

by motion while the body is in its normal condition', e.g. is not paralysed."

For the psychologists, action is simply "any muscular or glandular change which results from motor nerve impulse; usually a response to a stimuli."¹ Voluntary action is defined as "learned acts which are dependent upon habits of the individual as aroused by the complete environment (not the expression of some mystical force 'the will')." ²

The psychological definition of an "act" is more accurate than the legal definition and is therefore an improvement on it. Holmes's definition, in its concept and its choice of words most nearly approaches the psychological definition, but the superiority of the latter is readily demonstrable. Action, we know to-day, is the result not only of muscular contraction, but of muscular relaxation; it is also the result of glandular activity. But more important, it may be voluntary, involuntary or non-voluntary. The use of the term "will" by the courts and jurists need give us no concern. This is a word which the psychologists have also abused since its introduction into modern psychology by Wundt, who in turn borrowed it from Schopenhauer. Present-day psychologists wishing to be rid of the theological implications have substituted for it the word *volition*, the term used by Holmes. Since the psychological definition preserves, or at least does not preclude, the essential legal distinction between an act and its consequences—as in the familiar example of crooking the forefinger, which is an act, but if the finger is crooked against the trigger of a loaded pistol in such a situation

¹ Warren and Carmichael, *Elements of Human Psychology* (1930), 419.

² *Ibid.*

that a human being is likely to be hit, it is a wrongful act—it can be adopted with safety by the law in place of the present inaccurate legal definition.

Let us now proceed further into the field of legal liability and consider a class of acts for the consequences of which, depending upon the jurisdiction, recovery may or may not be allowed. In England,¹ Scotland² and Ireland,³ recovery is allowed for physical injuries due to nervous shock without impact. In many American states, and some Federal jurisdictions, recovery of damages due to fright or other emotional disturbances is denied; in others, it is permitted. The rule denying recovery has been severely criticized by legal writers,⁴ and such criticisms will, with the passage of time, probably have a salutary effect upon judicial opinion. Only one writer, however, has thought it worth while to inquire if psychology could illuminate the point.⁵

In denying recovery of damages caused by fright, the courts rest their decision in part on their belief that functional disturbances can result only remotely from emotional causes. Thus, in *Ward v. West Jersey, etc., R. Co.*,⁶ the court stated that "physical suffering is not the probable or natural consequences of fright, in the case of a person of ordinary physical and mental vigour." But in the year 1901, in the English case which first permitted recovery, *Kennedy, J.*, was daring enough to confess that

¹ *Coyle v. Watson* (1915) A. C. 1

² *Ibid.*, *Gilligan v. Robb* (1910) S. C. 856.

³ *Bell v. Great Northern Ry. of Ireland*, 26 L. R. Ir. 428 (1890).

⁴ Throckmorton, *Damages for Fright* (1921), 34 *Harv. L. Rev.*, 260, *Selected Essays on the Law of Torts* (1924), 303; Goodrich, *Emotional Disturbance as Legal Damage* (1922), 20 *Mich. L. Rev.*, 497; Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact* (1902), 41 *Am. L. Reg. (N.S.)*, 141, *Studies in the Law of Torts* (1926), 252

⁵ Goodrich, *op. cit. supra* note 4.

⁶ 65 N. J. L., 383, 47 *Atl.*, 561 (1900).

he "should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism."¹ Within recent years physiologists and psychologists have devoted careful attention to the effects of emotion on bodily function and their conclusions, although contrary to the belief of respectable judicial authority, are so firmly established that it would seem that they could not well be ignored by the courts.

The outward manifestations of fear have received their classic description at the skilful hands of Darwin²:

The eyes and mouth are widely opened, and the eyebrows raised. The frightened man at first stands like a statue motionless and breathless, or crouches down as if instinctively to escape observation. The heart beats quickly and violently, so that it palpitates or knocks against the ribs . . . The skin instantly becomes pale, as during incipient faintness. . . . Perspiration immediately exudes from it. This exudation is all the more remarkable, as the surface is then cold. . . . The hairs also on the skin stand erect; and the superficial muscles shiver. In connection with the disturbed action of the heart, the breathing is hurried. The salivary glands act imperfectly; the mouth becomes dry, and is often opened and shut. . . . There is a strong tendency to yawn. One of the best marked symptoms is the trembling of all the muscles of the body; and this is often first seen in the lips. . . . The voice becomes husky or indistinct, or may altogether fail . . . As fear increases into an agony of terror . . . the heart beats wildly, or may fail to act and faintness ensue; there is a deathlike pallor; the breathing is laboured; the wings of the nostrils are widely dilated . . . the uncovered and protruding eyeballs are fixed on the object of terror; or they may roll restlessly from side to side. . . . The pupils are said to be enormously dilated. All the muscles of the body may become rigid, or may be thrown into convulsive movements. The hands are alternately clenched and opened, often with a twitching movement. The arms may be protruded, as if to avert some dreadful danger, or may be thrown wildly over

¹ *Dunham v. White & Sons* (1901), 2 K. B., 669, 677.

² *The Expression of the Emotions in Man and Animals* (1897), 289. Cf. 1 Spencer, *The Principles of Psychology* (1873), 482.

the head. . . . As fear rises to an extreme pitch, the dreadful scream of terror is heard. Great beads of sweat stand on the skin. All the muscles of the body are relaxed. Utter prostration soon follows, and the mental powers fail. The intestines are affected. The sphincter muscles cease to act, and no longer retain the contents of the body.

That an emotion which expresses itself in such a manner should at times result in the serious derangement of bodily functions is not surprising. In one form of the ordeal of primitive legal systems we glimpse the practical utilization by the law of the knowledge that fear inhibits the salivary flow and swallowing. In the ordeal of consecrated bread or cheese (*judicium offae, panis conjuratio*, the *corsnaed* of the Anglo-Saxons) the accused was made to eat an ounce of bread or cheese over which prayers and adjurations had been pronounced. The accused was acquitted if he was able to swallow it. "This depended of course on the imagination," Lea¹ observes, "and we can readily understand how, in those times of faith, the impressive observances which accompanied the ordeal would affect the criminal, who, conscious of guilt, stood up at the altar, took the sacrament, and pledged his salvation on the truth of his oath." Similarly in India, when several persons are suspected of theft, a consecrated rice known as *sathce*, which is prepared with various incantations, is administered to all to be chewed lightly, and then spit out upon a peepul leaf. Anyone ejecting it dry is adjudged guilty.

The recognition of the injurious effects of emotion upon bodily function has resulted from investigations carried on by both physiologists and psychologists. This is a field, as Sherrington² has observed, where the two

¹ *Superstition and Force* (1878), 299.

² *The Integrative Action of the Nervous System* (1906), 256.

subjects inevitably overlap. On the present point their conclusions are in agreement. Thus Piéron¹ writes, "Emotion may give rise to true hemoclastic shocks, with all the consequences of these shocks, especially in certain individuals. Bernard and Joltrain have produced experimentally a characteristic hemoclastic crisis in a patient suffering from exophthalmic goitre and having fits of asthma as a result of a fright, by using an unexpected detonation close by as an emotional shock. . . . At the present time, we know of well-certified cases of various diseases, in which emotion played the essential pathogenic roles: cases of jaundice, nettlerash, eczema, asthma, diabetes, glaucoma, scurf (including the *canities brusques*), exophthalmic goitre (with persistent tachycardia and tremors, etc.)." With this general conclusion, Cannon,² a distinguished physiologist, to whom we owe a large part of our present knowledge of the subject, is in agreement. As illustrative cases of derangement of function due to fear, Cannon cites instances involving a fracture of the leg which failed to unite; the sensitizing of the sympathetic control of the heart so that even mild stimulation produced extreme effects; increase of arterial pressure; disorders of menstruation; emptying of the bladder; secretion of milk and the digestive process, which he states "may be profoundly deranged by anxiety and distress—the minor aspects of fear." He also records a number of cases of hyperthyroidism which followed intensely affective scenes in the lives of the patients, of which the following is typical: "A man of twenty years had a quarrel with his fiancée. She,

¹ Emotions in Animals and Man, in Reymert (ed.) *Feelings and Emotion* (1928), 284, 291 Cf. 293.

² *Bodily Changes in Pain, Hunger, Fear and Rage* (2nd ed., 1929), Chapter XIV and *passim*.

pretending to commit suicide, had in his presence swallowed some pills and fallen down screaming. The man departed hastily. Within a week he was suffering from swelling of the neck and nervousness. When he appeared at the hospital four months later he had lost weight, he presented a large goitre over which a definite thrill could be felt, and his basal metabolism was up 24 per cent. above the normal level." Alvarez has communicated to Cannon a case of persistent vomiting which began when an income tax collector threatened punishment if a discrepancy in a tax statement was not explained, and which ceased as soon as the matter was straightened out by Alvarez. It is hardly necessary to add that in addition to setting forth the cases, Cannon has also worked out experimentally the physiological basis of the tendency of strong emotions to effect a derangement. This need not, however, be set forth here.¹

In the light of the evidence thus brought forward the belief of the courts that there is only a remote connection between emotional disturbance and functional derangement is clearly erroneous. The effect of fright upon the human organism is at times just as direct and harmful as the blow of a club, and the estimate of the damages by a court or jury in terms of money is, as Mr Goodrich² has pointed out, "no more difficult a problem here than in any case of non-pecuniary damage—a broken leg or a bruised head." There is, however, a word of warning uttered by Cannon which is appropriate to reproduce here. "If an objective cause for

¹ See op. cit. supra p 180, note 2 at 258 et seq Cf Bard, *The Neuro-Humoral Basis of Emotional Reaction*, in Murchison (ed.) *The Foundations of Experimental Psychology* (1929), 449, Cannon, *Neural Organization for Emotional Expression*, in Keymert, op. cit. supra p. 180, note 1 at 257.

² Op cit. supra p 177, note 4 at 503.

a complaint is not found," he writes,¹ "nothing is easier than to attribute the difficulty to nervous factors. . . . The assumption that emotional agencies are causing mischief in the organism should be a last resort—an explanation which is offered only after every effort has been made to find another explanation. And even when the cause is ascribed to fear or rage or some other strong feeling, proof for that conclusion should be carefully sought both at the source of the trouble and in the effect of appropriate treatment."

The two preceding examples show that in the field of law which we have been considering, psychology can make an immediate and direct contribution. But psychology is not invariably prepared at the present time to aid in the development of all the legal rules or concepts based on psychological assumptions. As an illustration of its inability in this respect let us consider, from the same field, the rule that an individual is civilly liable for harm caused by him to another through failure to use ordinary care. In early English law and other primitive systems the liability for damages resulting from positive acts was absolute, irrespective of moral fault. "During the medieval period the principle which underlay the law as to civil liability can be stated somewhat as follows", writes Holdsworth.² "A man is liable for all the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. A man acts at his peril." Similarly, the laws of Hammurabi³

¹ Op. cit. supra p. 180, note 2 at 265.

² 8 *Hist. E. L.* (1925), 446. Cf. Wigmore, *Responsibility for Tortious Acts* (1894), 7 *Harv L. Rev.*, 315; *Selected Essays on the Law of Torts* (1924), 18.

³ Harper, *The Code of Hammurabi* (1904), 79.

provide that "if a physician operate on a man for a severe wound with a bronze lancet and cause the man's death; or open an abscess (in the eye) of a man with a bronze lancet and destroy the man's eye, they shall cut off his hands." As English law developed, this rule was generally modified, although as late as 1891 the medieval rule was invoked—unsuccessfully, however—in *Stanley v. Powell*,¹ where it was asserted that in English courts a plea that there was neither negligence nor an intent to do harm was no answer to an action which charged the defendant with having hurt the plaintiff's body. In general, an individual to-day is not liable for harm caused by him without fault; he is, however, liable in certain circumstances for harm resulting from his failure to use ordinary care. This liability was practically unknown prior to the nineteenth century.²

The gist to-day of the action of negligence therefore is the failure to exercise ordinary care. In determining what is ordinary care the courts use, in part, an objective test. Ordinary care, they say, is such care as an ordinarily prudent person is accustomed to exercise under the same or similar circumstances. "Negligence", Baron Alderson³ has declared, "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." The man of ordinary prudence is an old and familiar figure in the law and from all appearances he will have a long and troubled

¹ (1891) 1 Q. B. 86. Cf. 2 Pollock and Maitland, *Hist. E. L.* (2nd ed., 1899), 275.

² Jenks, *On Negligence and Deceit in the Law of Torts* (1910), 26 *Law Q. Rev.*, 159, 160.

³ *Blyth v. Birmingham Water Works*, 11 Ex. 781, 784 (1856).

life. At the present time he also appears to be essential to the legal process. If the judge, in instructing the jury with respect to ordinary care, should tell them, "In determining whether the defendant in doing what he did used ordinary care, you should determine whether in the same circumstances you would have done what he did", the defendant's sense of justice, since such a standard would be too uncertain, might well be outraged. If the judge, however, tells the jury that in dealing with the question of ordinary care they are to determine what the man of ordinary prudence would have done, or, in other words, apply an objective standard to the defendant's conduct, the defendant is more or less satisfied that his actions are being considered without prejudice. "Ordinarily fictions keep us at least one step from the truth and conceal the operation of the legal machine", Seavey¹ has observed. But in setting up the prudent man's conduct as the standard of care, the courts have established a psychological test. The determination of what a prudent man's conduct would be under certain circumstances is a matter of psychology. It is true that in deciding this question, the courts can probably get along very well without the assistance of psychology; if they determine the question in accordance with the sense or wishes of the community that is perhaps enough; under such circumstances it would not make any practical difference if a prudent man would in fact have done the opposite.

But psychology may nevertheless be slightly helpful in an analysis of the prudent man concept. In certain situations where the application of the concept is called for, the psychological investigator can reproduce the

¹ Negligence—Subjective or Objective (1927), 41 *Harr. L. Rev.*, 1, 9.

circumstances of the case and determine experimentally what a particular course of action would be. The situations where this could be done, however, appear to be relatively few and belong to the distant future. To-day psychology does, however, have a minor contribution to make with respect to the concept of the prudent man.

Although the modern study of character may be said to begin with Francis Bacon,¹ the subject is still in a formative stage. In the nineteenth century Galton² and Mill³ both made contributions to the subject, but it was not until the twentieth century that the field attracted any considerable attention. In this century the work of Shand,⁴ Paulhan,⁵ Roback,⁶ Spranger,⁷ Klages,⁸ Dewey,⁹ McDougall,¹⁰ Downey,¹¹ Kretschmer,¹² and others¹³ laid the foundations for a scientific approach to the question and presented it in more or less generalized form. Certain primary traits have been studied extensively but little attention has been paid so far to prudence. There is general agreement, however, on the point that prudence, or caution, may be regarded as a form of fear.¹⁴

¹ *Advancement of Learning* (1605), Books VII and VIII.

² *Study of Types of Character* (1877), 16 *Nature*, 344

³ *A System of Logic* (1843), Book VI

⁴ *The Foundations of Character* (1914)

⁵ *Les Caractères* (2nd ed., 1902).

⁶ *The Psychology of Character* (1928).

⁷ *Types of Men* (1928).

⁸ *Science of Character* (1929).

⁹ *Human Nature and Conduct* (1922)

¹⁰ *Character and the Conduct of Life* (1927)

¹¹ *The Will Temperament and its Testing* (1923).

¹² *Physique and Character* (1925).

¹³ See Roback, *A Bibliography of Character and Personality* (1927) for a bibliography of 3,341 titles in sixteen languages.

¹⁴ Shand, *op. cit.* supra note 4 at 267, Dewey, *op. cit.* supra note 9 at 155, Thomson, *The Springs of Human Action* (1927), 99.

Shand's¹ treatment of the point is perhaps the most illuminating.

Prudence or caution bears a certain resemblance to cowardice. Fabius Maximus, who saved Rome from Hannibal, was called cowardly by his countrymen, because he refused to fight pitched battles with the enemy, and contented himself with keeping them in sight, and being prepared to take advantage of their occasional weakness and mistakes. But when his friends came and urged him to wipe out this reproach, and risk a battle with the enemy, he replied: "I should be of a more dastardly spirit than they represent me, if, through fear of insults and reproaches, I should depart from my own resolution. But to fear for my country is not a disagreeable fear." This patriotic fear gave him courage to subdue the fear of loss of personal reputation; and it was thus determined by his love of country, in conjunction with the situation in which he found it placed. If we compare his generalship with that of Scipio Africanus, who, instead of defending Rome, attacked Carthage, we may infer with some probability not only that the wise caution of Fabius was due to this same fear, but that the boldness and brilliancy of Scipio was due to a temperament in which fear played less part, and a disinterested anger against the common enemy a greater. With the former, the advantages of the system of fear, and of its variable body of behaviour, were employed to the uttermost in the service of love; with the latter those of anger. The action of the sentiment would tend to correct the excesses to which either temper was liable, restraining the one from excessive caution, and the other from rashness. But its conduct would still be stamped by the prevailing emotion, nor could it exchange at will the caution due to fear for the audacity of anger.

On the precise question of prudence this is the most that psychology can offer the law with certainty at the present time, although, as the psychological analysis of character proceeds, its contribution will in all probability increase. But its present offering suggests that prudence is not, under all circumstances, a desirable standard. The conduct of the prudent man may well be the conduct of the cowardly man; and such behaviour may be socially undesirable. In effect, the courts have

¹ *The Foundations of Character* (1914), 267.

decided that the emotion of fear shall be the standard by which conduct is to be measured. The brave or the bold man is held liable if harm results from his actions ; the timid man is exonerated. Fear as the basis of conduct is not, however, peculiar to the law of negligence. It lies at the root of all, or most, of the rules imposing liability upon individuals for the consequences of their acts. The law does not look with favour on the individual who is inclined to put his doubts and fears aside and take a chance. In popular opinion this is perhaps an inversion of values. Beginning with Theophrastus¹ it is the timid or cowardly man, and not the bold man, who has been the subject of condemnation at the hands of character analysts. But the law's anxiety for security of interests has prevailed upon it to take the opposite position. Psychology may some day be able to show us whether or not the choice was a wise one.

The legal student who turns to psychology for its opinion on the validity of the psychological assumptions indulged in by the courts quickly discovers that psychologists have in few instances specifically examined the assumptions, and that he must himself apply the general conclusions of psychology to his problems. This is a condition which is surrounded with many dangers, unless the legal student has been also competently trained in psychology and is able to evaluate critically the material which confronts him. In some cases, however, the results are so generally agreed upon—such as the conclusions of the psychologists and physiologists in regard to the effect of fright on the human organism—that the possibility of misinterpretation or other error is slight. But cases of this type are comparatively rare,

¹ Aldington, *A Book of Characters* (1925), 47.

and the development of legal psychology is greatly handicapped by the fact that able psychologists have given so little of their attention to the objective verification of legal rules founded on psychological suppositions. In a few instances, however, when particular problems have been called to their attention, psychologists, by objective analysis, have given direct assistance to the courts.

One of the most successful of such instances is the technique developed by psychologists for the measurement of confusion between similar trade-names. When the trade or goodwill of a particular business has been centred around a trade-name, and a rival concern attempts to market goods under a similar trade-name, a court will restrain the rival concern from the use of the name, if it is apt to mislead purchasers. In practice, the judge, after hearing the testimony of witnesses who had been confused, weighs the evidence, adding to it his own opinion on the question of confusion, and either does or does not restrain the use of the name. Psychologists have now brought forward, as an aid to the court, a careful technique for the measurement, on an objective basis, of the actual confusion, if any. The problem was first suggested in 1909 to psychologists by Edward S. Rogers,¹ a member of the Chicago Bar and the author of *Goodwill, Trade Marks, and Unfair Trading* (1914). It has attracted the attention of a number of psychologists, particularly Paynter² and Burt³, who have worked out a sound solution.

¹ (1914). For a history of the subject see Paynter, *A Psychological Study of Trade-Mark Infringement*, 42 *Arch. Psychol.* (1920), 8.

² *Op. cit.* supra note 1; *A Psychological Investigation of the Likelihood of Confusion Between the Words "Coca-Cola" and "Chero-Cola"* (1919), 14 *Bull. United Trade Mark Assoc.* No. 5.

³ *Measurement of Confusion Between Similar Trade Names* (1925), 19 *Ill. L. Rev.*, 320, *Legal Psychology* (1931), 424.

In the test employed by Paynter, trade-names typed on slips of white paper, with the designation of the article appearing directly beneath the trade-name, were presented to the observer at uniform time intervals; immediately after the showing of the last slip a second list was presented in which the observer was asked to indicate the names he had seen in the first list. The observer was also requested to grade the slips in accordance with his degree of certainty. In the second list names were used which were new, those which were imitations of names on the first list, and those which were duplicates. Two groups of observers were used: those who had been informed that imitations were to be shown and those who were not. In a second test Paynter required the observers to arrange pairs of trade-names in an order according to their likelihood of confusion. In the first experiment Paynter found on the average that those unaware of the presence of imitations confuse 44 per cent. of the imitations with the originals; those aware of the presence of imitations confuse 23 per cent. The results of the second test were confirmatory of the results of the first test.

Burt presented a list of trade-names to the observer, followed by a second list containing some duplicates of those in the first list, some new names and some similar names. His test was conducted in connection with pending litigation¹; the name of the plaintiff—Citizens' Wholesale Supply Co.—was given in the first list and the name of the defendant—Consumers' Wholesale Supply—appeared in the second list. The observer was required to judge whether he had seen the names of the second

¹ *Citizens' Wholesale Supply Co. v. Downing*, 107 Oh. St., 422, 140 N. E. 683 (1923). In this case the court held there was no infringement.

list in the first list. An index of normal confusion was obtained for the experiment if the observer stated that a new name had been seen or that a duplicate had not been seen. In the particular experiment normal confusion was 10 per cent. The litigated names yielded 23 per cent. confusion. For his list of names Burt used trade-names which had actually been litigated and with respect to these he found an average confusion of 31 per cent. It is interesting to note that he found that the cases that had been judged infringements by the courts manifested the same average confusion as cases that had been judged non-infringements.

The technique developed by Paynter and Burt for the measurement of confusion between similar trade-names is an instance of the direct aid that psychologists can render to courts. In this particular field, however, the courts have shown no inclination to benefit by the tendered assistance. Judges still entertain the belief that their own estimate is the best measurement of the degree of confusion.

So far we have considered examples not drawn from the field of evidence. It is this field, however, because of the abundance of evidential rules apparently founded on psychological assumptions, which has attracted the major attention in attempts at psychologico-legal synthesis. Unlike the general relationship of law and psychology, it is possible to approach the relationship of psychology and evidence in a fairly complete and systematic manner, in the sense that a page by page (or rule by rule) search of a treatise such as Wigmore's *Pocket Code of Evidence*¹ will yield all, or nearly all, the rules into which psychological assumptions enter. A preliminary

¹ (1910).

application of this method, however, indicates that rules of this character are so numerous that it would be impossible to give them consideration here; the discussion which follows is confined, therefore, to arbitrary examples.

We will begin with the important subject of memory. In this connection there are three frequent situations with which the courts have to deal: (1) when a witness has no present recollection but offers a past recollection, as when he says, "I made a correct memorandum of this conversation while my recollection was fresh; I now remember nothing, but can offer my prior recollection as embodied in the memorandum"¹; (2) when a witness has a dormant recollection which he wishes to refresh, revive or stimulate by looking at a memorandum or other aid; and (3) when it is desired to test a witness's capacity of recollection. The rule which the courts apply when confronted with the third situation is perhaps the most difficult to estimate in psychological terms and will be considered first.

In testing a witness's capacity of recollection it is proper, in the discretion of the trial court, to cross-examine the witness upon his memory of events entirely unconnected with the event toward which his testimony was directed. "Repeated instances of inability to recollect give the right to doubt the correctness of an alleged recollection of a material fact," writes Wigmore,² "the force of the instance depending on the greater or less probability that the one thing could be forgotten while the other is remembered. Some of the most effective exposures of false testimony in the history of

¹ 2 Wigmore, *op cit. supra* p 174, note 1 at § 734

² *Ibid.*, 426

trials have been achieved by this method." A famous example of the method occurred during the trial of Queen Caroline.

Among the various charges of adultery and improper intimacy between the Queen (then Princess) and her servant Bergami during her tour in Germany, Austria, Italy, and the Mediterranean, one charge was made of adultery on board a polacca during a sea-voyage to Palestine; the witness Majocchi, a servant in her suite during most of her journeys, had testified specifically to this charge under the following questions from Mr Solicitor-General Copley: "Did the Princess sleep under that tent (placed on deck) generally on the voyage from Jaffa Home?" *Majocchi*: "She slept always under that tent during the whole voyage from Jaffa to the time she landed." *Mr Sol. Gen.*: "Did anybody sleep under the same tent?" *Majocchi*: "Bartolomo Bergami" *Mr Sol Gen.*: "Did this take place every night?" *Majocchi*: "Every night." On cross-examination *Mr Brougham* sought to test his trustworthiness by inquiring as to other details of the sleeping arrangements of the suite: "(On this voyage) where did Hieronimus sleep in general?" *Majocchi*: "I do not recollect (*Non mi ricordo*)" *Mr Brougham*: "Where did Mr Howman sleep?" *Majocchi*: "I do not recollect." *Mr Brougham*: "Where did William Austin sleep?" *Majocchi*: "I do not remember." *Mr Brougham*: "Where did the Countess Oldi sleep?" *Majocchi*: "I do not remember" *Mr Brougham*: "Where did Camera sleep?" *Majocchi*: "I do not know where he slept." *Mr Brougham*: "Where did the maids sleep?" *Majocchi*: "I do not know." *Mr Brougham*: "Where did Captain Flynn sleep?" *Majocchi*: "I do not know" *Mr Brougham*: "Did you not, when you were ill during the voyage, sleep below (in the hold) under the deck?" *Majocchi*: "Under the deck." *Mr Brougham*: "Did those excellent sailors always remain below in the hold with you?" *Majocchi*: "Thus I cannot remember if they slept in the hold during the night-time or went up." *Mr Brougham*: "Who slept in the place where you used to sleep down below in the hold?" *Majocchi*: "I know very well that I slept there, but I do not remember who else." *Mr Brougham*: "Where did the livery servants of the suite sleep?" *Majocchi*: "Thus I do not remember." *Mr Brougham*: "Were you not yourself a livery servant?" *Majocchi*: "Yes." *Mr Brougham*: "Where did the Padroni of the vessel sleep?" *Majocchi*: "I do not know." *Mr Brougham*: "When her Royal Highness was going by sea on her voyage (at another time) from Sicily to Tunis, where did she sleep?" *Majocchi*: "Thus I cannot remember."

Mr Brougham : " When she was afterwards going from Tunis to Constantinople on board the ship, where did her Royal Highness sleep ? " *Majocchi* : " This I do not remember." *Mr Brougham* : " When she was going from Constantinople to the Holy Land on board the ship, where did she sleep then ? " *Majocchi* : " I do not remember." *Mr Brougham* : " Where did Bergami sleep on these three voyages of which you have just been speaking ? " *Majocchi* : " This I do not know."¹

Such is the legal rule and its application. From the psychological standpoint this rule is founded on the assumption that " memory " is a unitary factor and that an individual possesses a generally good memory, a generally bad memory, or a type of memory lying somewhere between these two forms. Accordingly this rule has been criticized by Hutchins and Slesinger on the ground that its assumption is derived from the defunct " faculty psychology ". " The departure for limbo of faculty psychology," they write,² " taking with it the faculty of memory, indicates that cross-examination to other instances of forgetting, unrelated in kind to the facts of the case in suit, is a waste of time." In addition to their belief that the so-called faculty psychology is no longer with us, they bring forward, as evidence that memory is not a unitary factor, the general conclusion of psychologists that there is little if any transfer of training—that is, for example, the old belief of teachers that training in the reading of Latin and Greek made possible a transference of the training to another field, such as mathematics. Hutchins and Slesinger therefore conclude that " cross-examination of memory may well be confined to facts closely similar to those it is claimed

¹ 2 Wigmore, *Evidence* (2nd ed. 1923), 426.

² Some Observations on the Law of Evidence—Memory (1928), 41 *Harv L. Rev.*, 860, 870.

the witness has remembered in the case at bar."¹ These deductions appear plausible but it would seem wiser, before suggesting a modification of the rule, to ascertain what has been demonstrated by psychological experiments on the precise point.

It is true that the faculty psychology, with its concept of mental activity derived from a small number of different powers, is generally regarded as having been discarded and the cruellest criticism that can be directed against a psychologist is to describe his work as an offshoot of the doctrine of faculties. Nevertheless, by whatever name psychologists may choose to describe their work, the faculty theory with its corollary that formal powers function unitarily, is still to-day an essential part of psychological doctrine. "On arriving at the present day, no doubt, we find the doctrine of 'faculties' everywhere mentioned in terms of keenest reprobation", writes Spearman,² who has studied the survival of the theory with especial care. "Such hostility, however, shows itself on closer examination to be curiously concentrated against the *name*. Just the same actual doctrine is still freely accepted under very numerous synonyms, as 'powers', 'capacities', 'abilities', 'properties', and so forth. Despite all protests to the contrary, this ancient doctrine has in good truth not even yet been abandoned. Modern authors seem, rather, to have been incapable of abandoning it; for they have discovered nothing acceptable to take its place. Really, they have done no more than relax in effort to express it with rigid precision." In a later study,

¹ Ibid. This conclusion has been adopted without analysis by a recent writer. Gardner, *The Perception and Memory of Witnesses* (1933), 18 *Corn. L. Q.*, 391, 406.

² *The Nature of "Intelligence" and the Principles of Cognition* (1923), 25.

Spearman¹ made a little statistical analysis of the faculties advocated in current literature and now receiving the most general support. He found that a "memory faculty", in the thirty-three prominent publications analysed, was advocated nineteen times as against sixteen times for its nearest competitor the "intellect". The argument that the rule permitting a general examination of a witness's memory should be abandoned or modified because it is supposedly derived from the so-called faculty psychology is therefore of little or no weight, since the psychologists themselves have not abandoned the doctrine.

But when we turn to the experimental data on the point we find that even to-day there is little assistance here. Most of the studies are devoted to ascertaining the degree of correlation among the different aspects of memory. Earlier students concluded, for example, that an individual might have a good memory for words but not for faces or numbers. Thus Wissler,² in a pioneer study concluded that there was little correlation, although he added, "the whole subject of memory tests needs further consideration before positive conclusions can be reached." Bennett,³ however, in a later study found a high degree of correlation. Achilles⁴ concluded that an individual who recalled or recognized one material well may or may not recall or recognize another material well. Lee's⁵ experiments indicated that recall and recognition, while associated, are nevertheless distinct.

¹ *The Abilities of Man* (1927), 32

² The Correlation of Mental and Physical Tests (1901), *The Psychological Review*, 3 Monograph Supp. No. 6.

³ The Correlations Between Different Memories (1916), 1 *Jr. of Exp. Psych.*, 404.

⁴ *Experimental Studies in Recall and Recognition* (1920), 74

⁵ *An Experimental Study of Retention and its Relation to Intelligence* (1925), 44.

The memory learning tests employed by Garrett¹ suggested that memory consists of relatively specific abilities instead of being a unitary trait. Johannsen, Stirling and Levine² conclude that memory ability is not a general factor but is more or less specific for the type of material learned. Spearman,³ however, found a general memory factor present in certain types of memorizing although he concluded that "the tendency to retain dispositions . . . has shown itself *not* to possess any . . . functional unity (though commonly assumed to do so)." Carey,⁴ a pupil of Spearman, in a careful and important experiment, found that "there appears to be a very small general memory factor." Starch,⁵ after a survey of the experimental data since Wissler, reaches the general conclusion that "the import of the researches up to the present time seems quite certainly to prove that the higher mental capacities are in the whole rather closely correlated." Finally, Kelley,⁶ whose researches closely parallel those of Spearman, finds that "memory facility is a general factor operating with reference to words, numbers, and spatial material; in brief, operating in connection with all the material with reference to which tests were made. The claim that one is possessed of 'memories' rather than a memory 'ability' would not seem to be fully justified."

We may therefore conclude that upon the basis of these hopelessly conflicting conclusions there is no ground

¹ The Relation of Tests of Memory and Learning (1928), 19 *Jr. of Educ. Psych.*, 601, 607.

² An Experiment on Types of Memory Ability (1932), 23 *Jr of Educ. Psych.*, 28.

³ Op. cit. *supra* p. 194, note 2 at 287 and 412

⁴ Factors in the Mental Processes of School Children (1915), 8 *Brit Jr. of Psych.*, 70, 91.

⁵ *Educational Psychology* (1928), 60

⁶ *Crossroads in the Mind of Man* (1928), 108.

for suggesting the abandonment or modification of the legal rule with respect to the testing of a witness's capacity of recollection. It is not for the legal student, in cases of this type at any rate, to choose between the competing claims of psychologists, especially when those claims are apparently based on experimental data. It might be urged, however, upon the analogy of practices in the so-called exact sciences, that the law, because of the conflict of evidence on the point, should modify or abandon the rule. This argument is based upon the assumption that in the field of the exact sciences a new principle is not incorporated into the canons of established principles if the evidence in support of it is conflicting. But even if this is the general practice in the exact sciences, it is not a practice which should be followed in the present case. The evidential rule with respect to memory is the fruit of generations of experience and in practice the concept upon which it is based has proved a valuable device in the legal process. Because psychologists are unable now to make up their minds about the validity of the concept is no reason for the law to discard it, especially when the law's experience can be set against the psychological conflict, and the psychologists offer no substitute to take its place. Of course, if the psychologists establish in the future that the legal concept is entirely without foundation and that the triumphs which the law now credits to it were accidental in nature, the concept should be discarded irrespective of the fact that psychology may have no substitute to offer. But the possibility of the rule's ultimate discredit appears to belong to the distant future. The courts should welcome the available assistance of psychologists more freely than they do, but there are

certain minimum requirements which the law must establish for its own protection. Wigmore¹ has suggested the slight condition that the proposed test or conclusion be an accepted one in the field of psychology and that it have a reasonable measure of precision in its indications. This condition is not met in the present case.

When a witness offers his past recollection, as embodied in a memorandum, the courts, before admitting it, require that it have been made when the matter was fairly fresh in the recollection; but each case is judged on its own merits. Thus, a memorandum made five months after the event it describes has been admitted²; it has also been ruled out.³ In this connection, the experimental studies which have been conducted by Ebbinghaus,⁴ Radossawljewitsch,⁵ Finkenbinder,⁶ Bean,⁷ Crosland,⁸ and others, on the rate of forgetting are significant. Ebbinghaus's pioneer study in 1885 indicated that the process of obliviscence was subject to definite measurement. Ebbinghaus memorized nonsense syllables until he could repeat them once correctly, and then measured the rate at which he forgot them by the amount of time required for re-learning them at different

¹ 2 Wigmore, *op cit supra* p 174, note 1 at § 990

² *Cartan v. Phelps*, 91 N J Eq., 312, 109 Atl., 291 (1920)

³ *Spring Garden Mutual Ins Co. v. Evans*, 15 Md 34, 74 Am. Dec., 355 (1860).

⁴ *Ueber das Gedächtniss* (1885) Trans Ruger, *Memory* (1913). References are due to the English edition

⁵ *Das Behalten und Vergessen bei Kindern und Erwachsenen nach experimentellen Untersuchungen* (1907)

⁶ The Curve of Forgetting (1913), 24 *Am Jr Psych*, 8.

⁷ The Curve of Forgetting (1912), 21 *Arch of Psych*.

⁸ A Qualitative Analysis of the Process of Forgetting (1921), *Psych. Monog.*, No 130.

intervals after the original memorizing. He summarized his results as follows :

One hour after the end of the learning, the forgetting had already progressed so far that one half the amount of the original work had to be expended before the series could be reproduced again ; after eight hours the work to be made up amounted to two-thirds of the first effort. Gradually, however, the process became slower so that even for rather long periods the additional loss could be ascertained only with difficulty. After twenty-four hours about one-third was always remembered ; after six days about one-fourth, and after a whole month fully one-fifth of the first work persisted in effect. The decrease of this after-effect in the latter intervals of time is evidently so slow that it is easy to predict that a complete vanishing of the effect of the first memorization of the series would, if they had been left to themselves, have occurred only after an indefinitely long period of time.¹

Radossawljewitsch, who used nonsense syllables and poetry, found that, in regard to the meaningful material, one-third was forgotten in two days, one-half in seven days and three-fourths in thirty days ; one-third of the meaningless material was forgotten in one day, one-half in six days and four-fifths in thirty days. Ebbinghaus² came to the general conclusion that the ratio of what is retained to what is forgotten varies inversely as the logarithm of the time. No later experiments have ever impugned the validity of this conclusion, which, however, only states the rule with respect to changes of rate and does not refer to an absolute rate. The results of all the experiments undertaken to date make it clear that the rate of forgetting varies with the material learned, the method by which it is learned, and the individual who learns it. The rate is, however, always fast at first, and then becomes progressively slower. At the present time, the experimental work on the subject is still too limited to

¹ Op. cit. supra p 198, note 4 at 76

² Op. cit. supra p 198, note 4 at 78

be of practical assistance to the courts, but enough has been accomplished to make it apparent that the curve of forgetting may in time be safely utilized in determining whether or not a memorandum was made when the matter was fairly fresh in the recollection. Apparently, if a memorandum was not made within a week after the event it might just as well not have been made for a month.

In permitting a witness to refresh his recollection by consulting a memorandum, the courts are in accord with present psychological knowledge. A distinction is drawn, in analyses of the memory process, between *recall*, which is the reproduction of what has been learned, and *recognition*, which is recall with a time-factor added, or an awareness that the recall relates to past experience. It is with recognition that the law is principally concerned in permitting a witness to revive his recollection. The psychological evidence is clear that in thus allowing to be brought to mind what has been forgotten, the law is following sound psychological procedure.¹

Another important psychological concept from the field of evidence is the idea of "consciousness of guilt". The basis of the idea is stated thus by Wigmore²:

A criminal act leaves usually on the mind a deep trace, in the shape of a consciousness of guilt, and from this consciousness of guilt we may argue to the doing of the deed by the bearer of the trace. The reliance is not upon the testimonial credit of the person, but upon psychologic forces closely analogous to the forces of external nature. As an axe leaves its mark in the speechless tree, so an evil deed leaves its mark in the evil-doer's consciousness.

¹ Dashiell, *Fundamentals of Objective Psychology* (1928), 376 et seq.

² 1 Wigmore, *op. cit.* supra p. 174, note 1 at 544

Flight is frequently relied upon to show consciousness of guilt, although the rule is broad enough to admit almost any type of behaviour. "Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt", writes Wigmore.¹ " 'The wicked fleeth when no man pursueth; but the righteous are bold as a lion.' In our primitive system of law, the accused who fled, whether innocent or guilty, suffered forfeiture and escheat; though this was rather a mode of deterring him from refusing to appear for judgment than evidential rule. It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." Although evidence of flight is admissible to show consciousness of guilt, evidence that the defendant did *not* flee is not a circumstance which the jury may consider in its determination of the innocence of the defendant.² That the defendant drank to excess after the event,³ that he offered to take a whipping of thirty-nine lashes if he would then be discharged,⁴ that he furnished the parties implicated with him with money to leave the state,⁵ that he trembled and showed confusion before and at the time of his arrest,⁶ that he was nervous and showed a great deal of fear,⁷ that he took no part in the neighbourhood search for the child alleged to have been kidnapped by him,⁸ that before

¹ Op cit. supra p 174, note 1 at § 276, see cases collected in 25 *Am L. Rep* (1923), 886.

² *Banks v State*, 145 So, 104 (Miss 1933)

³ *People v O'Neill*, 112 N Y, 355, 19 N E, 796 (1889)

⁴ *State v de Berry*, 92 N C, 800 (1885)

⁵ *Jones v State*, 64 Ind, 473 (1878)

⁶ *Beavers v. State*, 58 Ind, 530 (1877).

⁷ *State v Baldwin*, 36 Kan 1, 12 Pac., 318 (1886).

⁸ *State v Harrison*, 145 N C., 408, 59 S. E., 867 (1907)

his arrest he "tucked his head" when told of the arrest of another,¹ are some of the varieties of behaviour which, to one court or another, has indicated a sense of guilt. In the Sacco-Vanzetti case the Commonwealth attempted to show a consciousness of guilt from the alleged anxiety of Sacco and Vanzetti on the evening of their arrest, and from the lies they told. The defence contended that their conduct was clearly explained by the fact that they were "Reds", in terror of the Department of Justice.²

Before examining this concept from the psychological standpoint it may be well to point out that the courts are quite aware of its limitations. "The conduct of one accused of crime is the most fallible of all competent testimony", declared Ormond, J.,³ many years ago. The general attitude of the courts on this point has met with the express approval of Wigmore. "Experience tells us", he writes,⁴ "that no fixed relations of inferences can be predicated for the same conduct in different persons. The same symptom is often the result of exactly opposite psychological conditions. This sort of evidence is admitted because there is a certain degree of uniformity in its meaning, but the variations from uniformity are so frequent, and depend so much upon personal character and logical circumstances that no *fixed* rules should be laid down. Repeated judicial warnings tell us that the evidence is merely to be estimated as best we can in the light of our knowledge of human nature in general and of the accused in particular." In a comparatively recent case,⁵ the Commonwealth attempted to show

¹ *Holt v. State*, 39 Tex. Cr. App. 282, 45 S. W., 1016, 46 S. W., 829 (1898).

² Frankfurter, *The Case of Sacco and Vanzetti* (1927), 60.

³ *Smith v. State*, 9 Ala., 990, 995 (1846).

⁴ Op. cit. supra p. 174, note 1 at 556.

⁵ *Springs v. Commonwealth*, 198 Ky., 258, 248 S. W., 535 (1923).

consciousness of guilt by proving that the defendant displayed nervousness when a bloodhound was utilized to track down the person who had burned a barn, and that when arrested, he exclaimed, "Ain't this hell!" Both items were held inadmissible, the nervousness because it could be accounted for by the defendant's anxiety about his wife, whom he had brought to town for dental work, and the profane expression on the ground that "It would be hard to imagine anything more calculated to make one nervous than to arrest him for a grave crime, particularly if he knew himself to be innocent; and what would be more natural than that he should make some remark expressive of his surprise and resentment because thereof."

Does psychology offer any data which substantiates or impugns the legal concept of consciousness of guilt? This question was investigated by Hutchins and Slesinger¹ in their notable series of articles on the law of evidence. These authors did not, however, bring forward any objective evidence, although the available studies of word-association, inhibition and self-control indicated that the legal concept rested on sound ground,² but attacked the problem from the standpoint suggested in the Sacco-Vanzetti and earlier cases, namely, that an equally plausible hypothesis can be offered, not involving guilt, but quite as adequately explaining the observed behaviour. No doubt in a number of cases—such as the Sacco-Vanzetti case—such an alternative hypothesis is available, and Hutchins and Slesinger conclude "that

¹ Some Observations on the Law of Evidence—Consciousness of Guilt (1929), 77 *U. of Pa. Law Rev.*, 725. For the background of these articles and references to others in the series, see (1928) 37 *Yale L. J.*, 1017, star note.

² For summaries, see Hartshorne and May, *Studies in Service and Self-Control* (1929), 285, et seq., Skaggs, *The Major Forms of Inhibition in Man* (1931), Chapter VII.

when consciousness of guilt is relied on by the prosecution, careful attention be given to the alternative explanations of his conduct advanced by the accused, including such data as may appear through a psychiatric examination."

Since the appearance of the study by Hutchins and Slesinger, important investigations of the problem from the psychological point of view have been undertaken by the Russian psychologist Luria, and his conclusions have recently been made available to English readers in a translation by W. Horsley Gantt.¹ In connection with his analysis of the problems of disorganization of behaviour, Luria investigated affect in criminals² and the results of his studies go far towards confirming the validity of the legal concept of consciousness of guilt. Luria and the courts both assume that a criminal act leaves a trace in the organism; in the eyes of the courts this trace may so influence subsequent behaviour that such behaviour may be used as a basis for inferring the commission of the crime. The validity of this inference is precisely what was investigated by Luria. "Can the psychologist", he asks, "studying the affective traces in the criminal objectively establish his participation in the crime?" This is a question which other psychologists from time to time, with the utilization of different methods, have attempted to answer.³

¹ Luria, *The Nature of Human Conflicts* (1932).

² Op cit supra note 1 at Chapter III. All references, unless otherwise indicated, are to this chapter.

³ It will perhaps be useful to reproduce here Luria's concise history of the point

"The question of the experimental diagnostics of participation is certainly not a new one, and its history is exceedingly interesting. Even a quarter of a century ago the problem of the experimental psychological determination of participation in crime was discussed by the well-known criminologist H. Gross, and many investigators worked on it, constantly

One of the principal advantages enjoyed by Luria over previous investigators lies in the fact that he was able to perform his experiments on subjects who had been arrested a few hours or days before, instead of upon

applying the methods of the associative experiment Jung, Wertheimer, Heilbronner, Löffler, Rittehaus, Stein, A. Gross and others attempted to use the method of the experimental diagnostics of participation. Freud and Stern have occupied themselves with this question, Munsterberg and other criminologists have studied the problem hopefully, and in 1910-11 there was not a more fashionable topic in psychology than the artificial manifestation of traces of the affective past. The subject was then dropped for about a decade after the appearance in 1911 of Lipmann's monograph . . .

"There were two reasons for the disappointment connected with these researches the majority of the investigators did not use actual criminals, and the psychologists created artificial situations which they intended to be similar to the crimes, but which were, of course, deprived of the affect connected with the actual crime. The criminals who did come into the hands of the investigators were usually accidental or they were ruined for this purpose by cross-questioning, trials, or conviction and consequent psychical disease . . . Also there were some disappointments arising from the method itself, the associative experiment produced traces of definite affective complexes, and, therefore, it was not suitable to record objectively the phenomena. The elaborated method of analysis of the associative reactions and the appearance of the symptom complexes was insufficient, the accessory difficulties might produce symptoms similar to the affective, but fairly complicated complexes might be reflected in other systems than that of the associative system. In the attempt to estimate the accompanying affective traces of the symptoms it became necessary to employ auxiliary methods not purely objective.

"Now there appeared a new cycle of investigations, attempting to employ the objective registration of psychophysiological processes, and often more modest questions . . . Beginning with Tarchanov, Veriguth, Binswanger and other authors, they tried to apply to the diagnostics of the affective traces a method of the physiological reflexes. Others—Benussi, W. Smith and Larson—used the respiration, the pulse, and the destruction of certain internal structures of equilibrium as an objective establishment of concealment and lying. Finally there was a third group from among the old investigators, like R. Sommer, who attempted to trace the reflection of the affective traces in the involuntary movements (Lowenstein, M. Seeling).

"Our researches are more closely allied to the last group, exhibiting however some radical changes in the establishment of the questions. In contrast to the former experimenters, we were able to use as material actual criminals taken usually before investigations and cross-questioning. Thus we were sure that we obtained material characterized by a continuous and strong affect; and, in contradistinction to the latter investigators, we made use of the reflection of the affective traces not in the passive system but in the active behaviour measured by our new method.

"Both of these factors enable us to place the question of the experimental diagnostics of participation on a more objective basis."

criminals who had already been liberated. He was also able to obtain criminals before they were questioned by the police and before they were told of the cause of their arrest; in some cases he was able to repeat the experiment after trial. Finally, he was able to subject to experiment a number of suspects who were not guilty but who had nevertheless been arrested. During the five years of his investigation he collected material relating to about fifty subjects, the majority of whom were murderers, or suspected murderers.

In his experiments Luria attempted to answer two questions: (a) Could he objectively establish the symptoms appearing in the response to the critical stimuli, so that he could differentiate the participating criminal from an innocent person? (b) Could he objectively establish them under the conditions of that resistance by the subject who is trying to conceal the appearance of the compromising affective traces? His method was to subject the suspect to a word-stimuli test, in which some words were neutral with respect to the crime situation, others were intended to directly stimulate the affective traces if the suspect was connected with the crime and others were doubtful. The results of his experiments were highly successful. In almost all the instances the affective traces of the crime were manifested in the experiments by a group of objective symptoms. "We are now convinced", he concludes, "that by a purely experimental method the psychologist is able to answer positively the question of the possibility of an objective diagnosis of criminal participation."

Luria found generally, on the basis of his entire work on human affect and conflict, that an individual who

has committed a crime experiences an affect and a disorganization of behaviour to a degree which cannot be compared with any other class of behaviour. The criminal, as he points out, is certainly far from being indifferent to his experiences; on the contrary he puts himself in an active relation to this experience; its trauma, urging him into activity, conditions the dynamics of his behaviour. The acute state of the trauma, Luria believes, complicated by the necessity of concealing it, creates in the criminal a state of exceedingly acute affective tension; this tension is probably exaggerated because the subject is under the fear of revealing his crime; in Luria's experience the more serious the crime the more marked the affect and the greater the danger of disclosing it; the more this complex is suppressed the more it tends to destroy the most important neuro-dynamical functions. In Luria's opinion the suppression of the complexes is insufferable and the subject experiencing them is certainly not in a condition to remain passive during the course of this affect; he must orient himself so that he can discharge the tension and save himself from an external play of excitation, which disorganizes his behaviour and keeps him incessantly under the fear of detection. Luria concludes that such a tension is undoubtedly one of the most serious factors for the criminal in the recognition of his guilt.

The evidence brought forward by Luria strongly confirms the soundness of the legal concept of consciousness of guilt. Law and psychology start with the same assumption but by different methods seek to reach the same end—establishment of participation in the crime. For the law, the unwitting behaviour of the suspect, correlated with the imagined behaviour under the same

circumstances of the fictitious normal man, is utilized as the basis for the ascertainment of guilt. The psychologist, on the other hand, subjects the suspect and a control to a carefully constructed test and on the basis of the behaviour manifested by the suspect during the test, correlated with the control's behaviour, determines guilt or non-guilt. The essential difference lies in the fact that the psychologists' method rules out the alternative hypothesis, which is the defect of the legal method. By proper safeguards the law can, however, minimize this defect to the extent that the danger of a miscarriage of justice on this point is reduced to a negligible factor.

As a final example from the field of evidence, we will consider the rules governing the testimonial qualifications of witnesses. A testimonial assertion, as Wigmore¹ has shown, involves three elements. A, for example, on the witness stand states that B shot C. Three processes are involved in this statement: (1) observation—A must have observed the shooting; (2) recollection—A must be able to recollect what he has observed; and (3) communication—A as a witness must be able to communicate what he has observed to the jury and the court. A witness must therefore have the capacity to observe, recollect and communicate, or he cannot qualify. An obvious example occurs when a witness is offered who is suffering from a severe form of mental disorder. But the rule is as well illustrated by a less extreme case. A is put on the stand to testify whether or not a signal light at a certain moment showed red or

¹ Op. cit. supra p. 174, note 1 at § 478. Cf. Hutchins and Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses* (1928), 37 *Yale L. J.*, 1017.

green. If it is shown that A suffers from the commonest of all forms of colour-blindness, the inability to distinguish red from green in terms of their red or green components, then, in this instance, A lacks the capacity to observe and is ineligible as a witness. In addition to these general rules, some courts insist that the witness must possess a moral responsibility to speak the truth.

Although there is, in the decided cases, much discussion of the rules, they are in practice exceedingly flexible ; their application is largely left to the discretion of the trial court, and cases are seldom reversed for rulings on the competency of witnesses. Not so many years ago, it was the practice of the courts to exclude the witness absolutely if he suffered from some derangement or defect. Thus in 1842 *Greenleaf*,¹ in summing up the law, declared that "It makes no difference from which cause this defect of understanding may have arisen ; nor whether it be temporary and curable, or permanent ; whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic ; or be intoxicated ; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness." But this ancient rule has now been modified so as not to exclude a witness absolutely ; the court now asks in each case, perhaps because of an already felt influence of psychology, whether the witness is trustworthy with respect to the point on which his testimony is offered, notwithstanding his defect or derangement.

¹ *Evidence* (1842), § 565 Quot. 1 *Wigmore op. cit. supra* p 174, note 1 at § 492.

This development of the law is well illustrated in *Regina v. Hill*,¹ decided in 1851.

The proposed witness said: "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire—I can, where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears. . . . They speak to me constantly; they are now speaking to me. . . . I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear"; he was then sworn, and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed; he was in some doubt as to the day of the week on which it took place, and said, "These creatures insist upon it it was Tuesday night, and I think it was Monday. . . . The spirits assist me in speaking of the date, I thought it was Monday, and they told me it was Christmas Eve—Tuesday; but, I was an eye-witness" The defence contended that the witness was *non compos mentis*, and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent; the Court of Criminal Appeal negatived this. Campbell, L. C. J.: "It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency, and the jury the credibility. . . . The rule which has been contended for would exclude the testimony of Socrates, for he had one spirit always prompting him." Talfourd, J.: "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions."

To-day most of the cases involving testimonial qualifications turn on the question of the capacity of the witness to understand the obligation of an oath. The witness's capacity is determined in practice by the nature of his answers to questions asked him by the court or the attorneys. If the answers appear to the court to reveal

¹ (1851), 2 Den & P. C. C., 254 Quot. 1 Wigmore op. cit. supra p 174, note 1 at 913.

a sufficient understanding he is permitted to testify ; if they do not, then he is ineligible. It will be instructive to examine several cases in order to understand the rule in action. A negro boy¹ was offered as a witness, and the court asked the following questions :

What is your name ? William Howard.

Were you sworn with the other witnesses a while ago ?
Yes, sir.

How old are you ? Ten years old.

Do you know what it means to be sworn ? No, sir.

Do you know what you mean when you hold up your hand and take the oath ? Yes, sir.

What is it ? Tell the truth.

If you were not to tell the truth, what would be done to you ? I don't know, sir.

Would it be wrong ? Yes, sir.

The court held the witness ineligible on the ground that it could not be inferred from his answers that he had a sufficient sense of the danger and wickedness of false swearing or that he comprehended and appreciated the sanctity and obligation of an oath. The court stated that the promise to tell the truth must be made under " an immediate sense of the witness's responsibility to God " and " a conscientious sense of the wickedness of falsehood ".

In another case, *Payne v. State*,² the following questions were asked by the prosecuting attorney :

Tell this man your name. Levi Philips.

How old are you ? Seven years old.

¹ *Crosby v. State*, 95 Ark., 156, 24 S. W., 781 (1910).

² 6 S. W. (2d), 832 (Ark. 1928).

When was your birthday? On Thursday, I think. I can't tell you just when it was, but it was on Thursday.

Is it wrong to tell a story? Yes, sir.

What becomes of boys that tell stories? They lock them up.

If you are good and die, where do you go? Go to Heaven.

Do you know Sam Payne here? (Exception by defendant.)

At this point, counsel for the defendant, possibly with the case of Will Howard in mind, asked the boy these questions :

Do you know what the punishment is, son, for telling a lie in court—you don't know that, do you? (No answer.)

Then you don't know what the penalty for perjury is, do you? (No answer.)

The court held that Levi Philips was a competent witness. It distinguished Levi's answers from Will Howard's, on the ground that, while both witnesses knew it was wrong to tell a story, Will Howard did not know that any penalty would attend if he did so, but that Levi knew he would be locked up if he told a story.

In *People v. Hudson*,¹ the rule is illustrated from a different angle. The witness, Switzer, was forty-two years old. Three physicians examined him and reported that he had not the mental capacity to make a choice between right and wrong and adhere to it ; that he could not reach a logical conclusion ; that he would justify himself in doing wrong ; that he had the mind of a nine-year-old child ; that his mental ability was not beyond the third grade ; and that he had the mental

¹ 341 Ill., 187, 173 N. E., 278 (1930).

ability to make a complete observation and a recollection sufficient to communicate his observation. The court held that he was a competent witness :

It may be summed up after what we have previously stated as showing very conclusively that he was a rather irresponsible person mentally and morally. As is frequently the case with mental defectives, Switzer had a rather keen sense of certain things. He testified, as to his understanding of an oath, that "an oath is sworn with the Lord Jesus Christ as your witness". He testified that was a sufficient answer ; that he had never thought of it before, but had been told by those in jail that he would be sworn before the Lord Jesus Christ to swear to the truth. It seems apparent that he had a very indefinite and vague idea of the obligation of an oath, but we think the objection to his competency as a witness was properly overruled.

It is by such methods that the courts diagnose mental ability. The assistance which psychology can render is obvious. More than forty years ago Cattell¹ pleaded for the standardization of tests of individual differences. In the intervening years a large share of the energy of psychology has gone into the construction of standard tests designed to measure intelligence. In 1908 Binet² published his important article on the development of intelligence in children in which he explained for the first time his method of calculating mental age. Binet's work was quickly taken up by other psychologists and numerous revisions of his scale were proposed. The various modifications of his scale which were put forward culminated in the so-called Stanford Revision,³ which represents five years of thorough study of the

¹ Mental Tests and Measurements (1890), 15 *Mind*, 373

² Binet et Simon, Le Developpement de l'Intelligence chez les Enfants (1908), 14 *Année Psychologique*, 1.

³ Terman, Lyman, Ordahl, Galbreath and Talbert, *The Stanford Revision and Extension of the Binet-Simon Scale for Measuring Intelligence* (1916). The same year Terman published a guide for the use of the scale. *The Measurement of Intelligence* (1916).

entire problem. The Stanford Revision is now standard. If adopted by the courts in place of their present haphazard and almost meaningless method of diagnosing mental age it would provide a certain, standard, and scientific method of answering the question before the court. Its reliability and utility have been thoroughly tested in the school systems of the world and in the universities; it has also been widely and successfully used as a test for vocational fitness. The test is simple to use and requires only a few minutes to apply. Its adoption by the courts would eliminate the occasional reversals on rulings of mental competency.

It should be pointed out, however, that the Stanford Revision has one limitation from the legal standpoint. The test is designed to measure intelligence, and if applied to a witness its results will tell the court whether or not the witness has the necessary competence to observe, recollect and communicate. It will not, however, inform the court whether or not the witness, if a child, realizes the obligation of an oath and will tell a truthful story. To meet this problem the courts will perhaps have to avail themselves of the tests designed to determine the knowledge and attitude of children towards moral problems. These tests have not been as widely employed as the intelligence tests, but their results, on the basis of thorough checks, have been found to be accurate.¹ Such tests provide a far sounder basis for estimating the probable truthfulness of a child's testimony than the present crude legal methods.

It should be pointed out also that if the tests are adopted by the courts they will inevitably be extended to

¹ Jones, *Children's Morals*, in Murchison (ed.), *A Handbook of Child Psychology* (1931). There is a full bibliography of test material at the end of the article.

situations other than the determination of the competency of witnesses. This, however, is no argument against their utilization by the courts. It may demonstrate, indeed, that other legal rules or concepts are antiquated and need revision. Thus, in *State v. Schilling*,¹ the defendant who was twenty-eight years of age, killed an officer while attempting to escape arrest. Experts subjected the defendant to intelligence tests and determined that he had a mental age of eleven years. His counsel therefore attempted to rely on the rebuttable presumption that an infant, between the ages of seven and fourteen, is incapable of committing a crime. The court rejected this contention on the ground that while there was such a presumption with respect to an infant of tender years, the presumption does not extend to one of advanced years. But as Sheldon Glueck² has pointed out, the historical reason for the rule is not based upon the tender age of an infant alone, but upon his mental and moral capacity. As he has shown further, when the rule was introduced it was universally, though tacitly, believed that the mental age and the physical age are identical. There can be no question to-day that psychology has conclusively established the contrary. The general adoption of the intelligence tests by the courts not only may, but should, require that the application of the presumption with respect to children be extended also to adults who are shown to be mental infants.

As a concluding example for this chapter it may be well to mention briefly the efforts of psychologists to devise a technique for the detection of lying. For the law, the principal method is cross-examination, and

¹ 85 N. J. L., 145, 112 Atl., 400 (1921)

² *Mental Disorder and the Criminal Law* (1925), 196.

although it has scored many notable triumphs it would be far inferior to such an absolute method as the psychologists are seeking. Hypnotism has been suggested, as has also scopolamin, a drug which induces unconsciousness but which still permits the subject to respond to questioning. Experiments indicate that a patient under the influence of hypnotism or scopolamin will answer questions truthfully. Experiments with these two methods, however, are of too slight an extent to warrant the adoption of either method at this stage. The method which to-day is attracting the widest attention was developed in the United States by Keeler, Marston and Larson.² This method involves the use of an apparatus which registers changes in blood pressure and respiration. The theory is that a conscious effort to repress a true statement and substitute a false one will cause a change in the heart action. By noting the changes in the heart action the experimenter will be able to separate the true from the false statements. He will then be able to draw inferences from the fact that the suspect lied at certain points in his testimony. Although this method has been extensively investigated and has produced some remarkable results, it has not yet reached the point of development where it could be employed with reasonable safety. The investigation of this problem by psychologists is, however, one of the few examples of a deliberate effort on the part of psychologists to be of assistance to the law.

It has been the task of this chapter to determine whether or not psychology is prepared at the present day

² For the history and description of the various methods see Larson, *Lying and its Detection* (1932). See also Wigmore, *The Principles of Judicial Proof* (1931), Chapter XXVI.

to contribute materially to the advancement of legal knowledge. It is apparent, I think, from the examples considered above, that in some departments of the law it is now prepared to make contributions of such definiteness and value that the law can neglect them only at the risk of promoting injustice. But how numerous such contributions are it is impossible to estimate. My belief, however, as I have said, is that they are not so numerous as many writers indicate. In this chapter I have intentionally omitted discussion of such topics as the psychology of testimony or the fallibility of observers, as their value, or lack of it, is well known to the legal profession and the literature concerned with them needs no elaboration. I have selected instead some rules of law outside the field of evidence—the customary hunting ground of the psychologist—and have attempted to show that in such widely separated departments as negligence and trade-names psychology can be of immediate assistance. I have also tried to show that many fields of psychology are as yet unexplored and that although the basis of a legal rule—as in the prudent man concept—may be altogether psychological, the psychologist is unable to illuminate it. But the conclusion which all the examples suggest, and which should be emphasized, is that the synthesis of law and psychology must develop in the same manner as both law and psychology have developed—that is, by a cautious, critical analysis of one problem at a time. It is in accordance with this principle that I have deliberately chosen for analysis three problems from the law of evidence from the half-dozen or more which have been analysed from the psychological position by Hutchins and Slesinger. From this analysis we can draw several

inferences. In the first example—the rules relating to memory—it appears that the psychologists are hopelessly divided in their conclusion. Nevertheless, Hutchins and Slesinger urge the courts to adopt a particular view. It happens that this view is the one with which I am in sympathy and which appears to me to be supported by positive evidence from related fields, such as the conclusions with respect to the rate of forgetting. But at the present stage the wisest rule is for the lawyer to refrain from taking sides on psychological questions which yield different conclusions upon experimental analysis. Neither the lawyers nor the courts are competent to choose between conflicting claims of this character. In the second example—consciousness of guilt—Hutchins and Slesinger approach the point conceptually and ignore the experimental evidence. It is this method which has been most widely employed in the past and upon it I believe must rest the primary responsibility for the low esteem in which the whole subject of the synthesis of law and psychology is generally held. Few subjects lend themselves more pliantly to easy generalization than psychology, and it is for this very reason that the law should insist upon verified objective evidence of psychological conclusions. In the third example—the capacity of witnesses—the psychological conclusions with respect to intelligence tests are, in their essentials, clear and undisputed, and to Hutchins's and Slesinger's suggestion that they be adopted by the courts there remained to be added only a discussion of the limitations of the tests and an indication of how those limitations might be met. I should add that the Hutchins and Slesinger articles have been selected for criticism because they represent a real advance upon

previous studies and are, taken as a whole, among the best informed and most intelligent analyses of the subject that we possess. The development of the synthesis of law and psychology will be a long and perhaps a tedious process ; but it is a process, however much patience it may require, which for the law will yield a fruitful harvest.

CHAPTER VI

POLITICAL THEORY

POLITICAL theory, since its rise in the latter half of the eighteenth century as a distinct department of knowledge, has always maintained a close connection with jurisprudence. At times, indeed, political theory has passed altogether into the custody of the lawyers and its destiny has appeared indissolubly linked to the development of juristic thought. From jurisprudence it has borrowed not only its terminology, but many of its concepts and much of its method. Three of the most important movements in modern political thought are contributions from the law. To Maine, who borrowed them from Savigny, political science owes the fruitful and widely utilized historical and comparative methods; to Austin it is indebted for the disparaged, but still tenacious, deductive and analytical studies of the nature of the state; and Gierke and Maitland are generally regarded as the initiators of the influential pluralist movement. That jurisprudence has been levied upon heavily by political theorists should not surprise us since the two fields are to a considerable extent concerned with identical problems; both are occupied with public control of individuals and with the relations of individuals to one another. But the connection between law and political theory has not been one-sided; it has been completely reciprocal. Political theory, as a separate branch of inquiry, has influenced juristic thought perhaps

as extensively as any other department of knowledge. To it jurisprudence owes much of its standing as a social science; from political theory first came the impetus which culminated in jurisprudence freeing itself from the sterile analytical method of Austin.

To-day political theory's connection with jurisprudence is still close, although in its increasing emphasis upon the actual functioning of government, rather than upon its structure, it is tending to differentiate itself from jurisprudence. A shift of attention from structure to function is also a marked characteristic of contemporary jurisprudence; but, while this movement may parallel the similar movement in political theory, it appears—because of the different subject matters—that they will not coincide, at least during the preliminary stages. Present-day political theory seems to offer contributions to legal thought at three points: sovereignty and the notion of law; the doctrine of the separation of powers; and theories of rights. Let us consider the contributions in the above order.

(a) Sovereignty and the Notion of Law

Contemporary political thought, in its analysis of the question of sovereignty, is concerned principally with two problems: (a) Should the state be legally supreme and unlimited or should it be placed upon a parity with other associations of the community, such as the church and trade unions? (b) What is the relation between the state and law? The answers which modern political theorists have given to these two questions have raised a storm of major proportions in current social thought.

In the classical theory of the state, as it has passed from Luther to Bodin, to Hobbes, Rousseau, Austin,

and finally to Hegel and his disciples, the state is held to be legally supreme and unlimited.¹ Sovereignty, in the classical idea, is an essential attribute of the state, and in the famous words of Bodin,² "Maiestas est summa in cives ac subditos legibusque soluta potestas"—sovereignty is supreme power over citizens and subjects unrestrained by laws. This concept is the child of the Reformation. During the Middle Ages, with its independent systems of church and state, neither deriving its authority from the other, the modern notion of sovereignty was impossible.³ But the creation, at the Reformation, of separate communities, which refused to submit in either their religious or political life to the single authority of Pope or Emperor, compelled the formulation of a doctrine which would reject external claims to superior authority and insure internal unification. It was Bodin, in his theory of the State, who provided such a doctrine. Luther had previously laid the foundations for Bodin's theory when, in order to combat a stubborn but divine church, he had been forced to contend for the divine power of princes. From Luther to Bodin was a short step. Bodin saw clearly that the religious conflicts initiated by Luther were a threat to the continued existence of the newly created communities,

¹ For the history of the theory of sovereignty see Ward, *Sovereignty* (1928), *passim*, Chen, *Recent Theories of Sovereignty* (1929), *passim*; Coker, *Pluralistic Theories and the Attack upon State Sovereignty* in 4 Dunning, *A History of Political Theories* (1924), ed. Merriam and Barnes, Figgis, *Studies of Political Thought from Gerson to Grotius* (1907), *passim*, Laski, *Foundations of Sovereignty* (1921), 1 et seq., 209 et seq.

² *De Republica Libri Sex* (1586), Book I, Chapter VIII. The problem here is the meaning to be attributed to *potestas*. Is it supreme because of highest authority based upon positive law or because of actual might? Professor McIlwain adopts the view that there can be no question that in Bodin's meaning it is the power with the highest authority and not the power highest in actual might. *Sovereignty Again* (1926), 6 *Economica*, 253.

³ Maitland, *Lectures on Constitutional History* (1919), 102; Figgis, *The Divine Right of Kings* (2nd ed., 1914), 13.

unless there was a unification of power within the communities. By attributing sovereignty to the state, Bodin furnished the Princes of the Western World with an invincible weapon against religious claims and guaranteed the independence of each community. In every community, he held, there must be some definite authority which commands obedience and which is itself beyond the reach of authority, otherwise the state cannot survive. Every political thinker in the classical tradition from Bodin to Austin was to utter the substance of this thought. In John Austin's hands it received its most precise statement and before we review the conflict now waging around the concept of sovereignty it will be helpful to understand exactly what Austin understood sovereignty to mean.

Austin¹ analysed the conception of sovereignty for the purpose of distinguishing between "law properly so-called and laws improperly so-called." Law, he held, is a command from the sovereign person or body in the political society to a member or members of the society. Such commands, he asserted, are laws properly so-called and are thus distinguished from laws improperly so-called. But it is necessary to define the sovereignty from which the command issues. Here Austin offers the original notion that sovereignty has two marks which distinguish it from other forms of superiority: The bulk of the people of a given society have the habit of obedience or submission to this superiority, and this superiority has not the habit of obedience to any other superiority. Sovereignty, he therefore defines as follows: "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience

¹ *Lectures on Jurisprudence* (5th ed., 1885), Lect. VI.

from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." This precise reformulation of Bodin's doctrine of sovereignty represents the heart of the modern analytical jurist's conception of the state. This conception, most analytical jurists are now agreed, insists upon three requirements¹: a community in whose name sovereignty is exercised in a particular territory; the attribution to sovereignty of the supreme power to issue commands; and the recognition of such commands as having the force of law. Thus, from Austin's position, the state is legally supreme and unlimited, and from it law derives its authority. Austin's treatment of law and sovereignty is the fountain-head of the analytical theory of the state, which has been a dominant influence in political thought and jurisprudence since his day. But the circumstances of a new age require a new political philosophy and the doctrine of the analytical jurists has been subjected to a heavy fire. It remains to be determined if the aim of its opponents has been effective.

The assault launched against the analytical theory of the state falls into two well differentiated movements: first, the so-called pluralist reaction against the analytical theory; and second, a reaction against the reaction. Those who have associated themselves with the second movement have taken a stand which the pluralists hold to be midway between that of the analytical jurists and their own.

Three arguments have been relied upon by the pluralists in their attacks upon the theory of state

¹ Willoughby, *The Fundamental Concepts of Public Law* (1924), Chapters VII-VIII.

sovereignty : an argument from history, an argument from utility, and an argument from ethics.

From the historical view it is urged that the contemporary state, with its claim to sovereignty, is the product of historical circumstances. It is pointed out therefore, that sovereignty is not an absolute but an historical variable, and that while it may have been a valuable concept in the past it is now a dangerous anachronism blocking progress and should be eradicated from political thought. That the pluralists have proved their case with respect to the historical basis of the idea of sovereignty must be conceded. The conception of the state, as territorial and omnipotent, arose because of the special set of circumstances created by the religious wars of the sixteenth century. It was a notion which, before that time, respectable political theorists would have repudiated with the simplest logic ; and, if we turn to the future, it is not difficult to imagine a reorganization of society in which the notion will have no applicability and will be altogether devoid of meaning. Sovereignty is thus always conditioned by the circumstances of the particular period ; if the times tend toward the creation of an unlimited and irresponsible state, the doctrine of sovereignty is a useful tool for those who would wield power ; if the current runs in the other direction it is a concept without vitality. In either event, it is an historical variable and not, as the analytical jurists¹ have maintained, an attribute of political authority which has not changed its essential character since tribal days. On the historical side it has also been argued that it is impossible to fit the analytical theory to actual states as they have existed and that the theory is an

¹ Willoughby, *The Fundamental Concepts of Public Law* (1924), 157

artificial absurdity. The most striking example is the United States. It is customary for analytical jurists to locate sovereignty in the United States in the amending power. Thus Willoughby,¹ a leading representative of the analytical school, writes, "under the amending power . . . it is possible to take away from any given State, against its will, and by a perfectly legal process, any or all of the powers which it now possesses, and from this result the objecting State has no legal means of escape by secession from the Union or otherwise." But, as Professor Laski,² has pointed out, the power to amend the Constitution is limited by the exception that no State shall, without its own consent, be deprived of its equal suffrage in the Senate. Theoretically, therefore, the conception of sovereignty cannot apply to the United States since nowhere in its structure is it possible to locate legally supreme and unlimited power. But the historical argument so far as it applies to the past or the future tells us nothing of the present. To consider the applicability of the concept of sovereignty to present political conditions, we must turn to the arguments from utility and from ethics.

From the utilitarian point of view it is urged that the analytical theory of sovereignty is so remote from practical life that it is of little or no worth for people who must live in a real world; that a theory of sovereignty to be acceptable to-day must take into account, and adjust itself to, the entire social environment. The analytical theory of sovereignty is purely a formal one;

¹ Willoughby, *The Fundamental Concepts of Public Law* (1924), 249.

² *A Grammar of Politics* (1925), 49.

it is studied essentially as an abstraction although its adherents attempt to point out its applicability to certain concrete situations; they admit,¹ nevertheless, that the assertion that the state is unlimited is merely made for formal purposes and that it in no way implies that the actual state has no limits. Pound² has very neatly compared analytical jurisprudence to a herbarium. "In the herbarium," he writes, "typical forms—that is, forms chosen by the collector because they conform most nearly to a picture he has made himself—are pressed and dried and classified, and an ideal vegetation is written upon that basis. It helps us to understand plants undoubtedly. But it falls to pieces as a description of nature whenever one looks attentively at the facts of nature in the field." The analytical theory of sovereignty is a herbarium specie; it is related to the actual States of the world as the herbarium species are related to the variety of individual forms in nature. The fact that states are subject to definite limits in their power may be irrelevant for the purposes of analytical jurisprudence, but in the world in which we live it is a fact of great significance.

It is upon ethical grounds, however, that the pluralists base their principal objections to the analytical theory of sovereignty. The essence of the attack from this standpoint is that the state is not *sui generis*, that it is merely one of many associations which function in the community. There seems to be a genus, as Maitland³ said, of which the state and other associations are species.

¹ Op. cit. supra p. 226, note 1 at v.

² *Interpretations of Legal History* (1923), 128.

³ Introduction, Gierke, *Political Theories of the Middle Ages* (1900), ix.

Since the other associations, such as the club, the family, the church and the trade union, are of the same class as the state, they do not depend for either their creation or their existence upon the will of the state ; like the state they came into existence spontaneously to fulfil social needs. The state is subject, therefore, as are other associations, to ethical appraisal. Its will as such is not superior to the will of other groups in the community and it is only entitled to obedience upon clear proof that the particular ends which it seeks to accomplish are good. On the international side it is likewise urged that one state is not entitled to be the sole judge in determining matters which concern other states. "England ought not to settle what armaments she needs, the tariffs she will erect, the immigrants she will permit to enter", writes Laski.¹ "These matters affect the common life of peoples ; and they imply a unified world organized to administer them." The state, viewed from this position, either internally or externally, is plainly, in the classical sense, not sovereign.

From this attack upon the theory of sovereignty it would seem to follow that a court should not apply the law of the state to an association against its will. A trade association, the pluralist argument has implied, being on a parity with the state, is entitled in a court of law, if it so desires, to have its rules prevail over the rules of the state, since its own rules are framed to meet its own peculiar needs. Such a doctrine amounts to legal anarchy and would deprive any system of law of most of its usefulness. It was at this stage of the argument that the reaction began against the pluralist attack upon the theory of sovereignty.

¹ Op. cit. *supra* p. 226, note 2 at 65.

The leaders of this reaction—McIlwain,¹ Dickinson,² Elliott,³ and Emerson⁴—while they admit many of the criticisms brought by the pluralists against the classical theory of sovereignty, assert nevertheless that “there must be a single final source of law which all inferior tribunals and officials within that community are content to recognize as speaking with ultimate authority, and to whose pronouncements they will therefore voluntarily conform, so far as they know how, their own separate acts and decrees.”⁵ Professor McIlwain’s insistence that the term “sovereign” has no proper application beyond the domain of law, and that in a legal sense it is merely a presupposition of any system of order according to law has won general acceptance in this new group. It is insisted that the choice is between the principle of sovereignty, which asserts that in every community there must be a higher power competent to settle the lines of demarcation between conflicting spheres of rights and interests, and the principle of anarchy, which maintains that the resolution of conflicts must be left to the free decision of each unit. Emerson, the most recent writer of the group, concludes that the choice between these principles depends in the last analysis on the justifiability of the use of coercion. He recognizes, however, that the justification of the use of compulsion is not absolute but depends upon the particular circumstances of the particular community. The present state of society, he concludes finally, demands that it shall have the right of

¹ Op. cit. supra p. 222, note 2. A Fragment on Sovereignty (1933), 48 *Pol. Sci. Quar.*, 94.

² A Working Theory of Sovereignty (1927), 42 *Pol. Sci. Quar.*, 524 (1928), 43 *ibid.*, 32.

³ *The Pragmatic Revolt in Politics* (1928), 86 et seq. and passim.

⁴ *State and Sovereignty in Modern Germany* (1928), 254 et seq.

⁵ Op. cit. supra note 2 at 525.

an ultimate appeal to force. If we admit the right of compulsion, as necessary for the maintenance of society and the protection of its members, there must then be some body in the community which, when controversy arises, can utter the final word. If we are dealing with a federal system we may have several bodies, which, in their respective spheres, will be supreme.

Professor Laski,¹ as the *doyen* of living pluralists, has examined this argument and found it unconvincing. Law must be conceived, he holds, as related to a moral end. Whether or not a decision of the state is good, he insists, can only be answered in terms of the judgment of individual citizens. This, of course, is at variance with the idea of a sovereign state, since the "action of a sovereign state binds as such without regard to whether that action fulfils the obligation to which the state is bound by its inherent character." The idea that the decisions of the state have a validity other than formal, because the state is supposed to be a safeguard against particularistic interests, and acts in the name of the whole community, is a fallacious one, in so far, he holds, as it seeks to make these qualities necessary and *a priori* attributes of the state. The state, he points out, is an abstraction and what we have to examine are the acts of the Government which speaks in its name. We do not know in advance whether the decision of the government, in any given instance, is in the interest of the whole community until we know what the content of the decision is. That judgment, he holds, must be pronounced by those who are to be affected by it. He concludes, however, with the highly significant statement, "I entirely agree with the view that the cases

¹ *Studies in Law and Politics* (1932), 251

where men or associations oppose the will of the state should always be cases of last instance ; I do not need to be convinced that peace is almost always better than conflict."

Professor Laski's argument, it seems to me, comes down to this : he admits the necessity for a body within the community which can utter, in nearly every case, the final word when controversy arises ; he denies, however, that the pronouncements of this body are entitled to obedience as such ; it is for the individual citizen to examine the content of what this body wills, and determine from his own position whether or not it is good and reasonable and therefore entitled to obedience. But, he says further, the citizen should oppose the will of this body only in "cases of last instance".

As thus expressed, Professor Laski's view does not appear to differ fundamentally from the views of his opponents. Both agree that there should be some body with the ultimate power to resolve controversies. Professor Laski would, however, impose two limitations : (1) in cases of last instance the citizen shall be entitled to oppose the pronouncements of this body and (2) the label "sovereignty" must not be applied to the body. Neither of these limitations is vital. Professor Laski objects to his opponents' claim that the solutions of this body have a validity other than formal because the state claims to act for the entire community ; but he himself admits the authority of the solutions except for extreme cases—he admits, that is, that the law of the state, except in extreme cases, shall prevail over the rules of other groups—churches, trade unions, etc.—within the community. This is ninety-nine per cent. of what his opponents ask ; as to the remaining one per cent.—the

cases of last instance—I venture to guess that they will admit that also. As examples of such cases, Professor Laski cites the men who resisted Charles I in 1642, those who revolted in France in 1789, and in Russia in 1917, and the opposition of the Huguenots to Louis XIV's demand for a unified religion. Professor Laski is here merely asserting the principle that when the men who constitute the government—the individuals in the legislature and on the bench—appropriate the power of that government for ends to which the community is hostile, the community, if it cannot by orderly processes remove the individuals or curtail their power, is entitled to do so by revolution. I suppose it is proper to say that the men who constitute the government are entitled to resist such a revolution, since they will do so in fact. In such cases we pass beyond the realm of law into the domain of political actuality. Professor Laski's opponents, to be at one with him in his first limitation, need concede only the obvious fact that the authority of the body which is entitled to utter the final word with respect to controversy may be shattered by revolution. Professor Laski's second point, which, though only implied, is none the less real, that the label "sovereignty" should not be attached to the concept of an organization entitled to finally resolve conflicts is perhaps well taken. Professor Dickinson¹ believes that in so far as the word is used to express this concept it is a helpful part of a political vocabulary, although he adds that if it is to continue to be helpful, it must be kept clear of confusions which warp its meaning. He rests this belief on the ground that if the concept of an ultimate dispute-settling body is thus earmarked the idea of "law" will be kept

¹ Op. cit. *supra* p. 229, note 2 at 534.

distinct from the other kinds of rules which influence human conduct and relations. The need for such a distinction is of course obvious, but the utilization of the word "sovereignty" is not necessary to preserve it. In political discourse the word might be a useful shorthand description of the concept for which Professor Dickinson and his fellow writers are contending and which the pluralists¹ admit is necessary. But the word is so charged with different meanings that it is more than doubtful whether in practice it would be limited to the meaning Professor Dickinson would ascribe to it. In the political vocabulary it is not an essential word, and its employment has a tendency to loose thinking and easy solutions. If the word were banished altogether from political discourse the resulting discontinuance of the endless discussions which now centre about it, and the direction instead of the attention of political theorists to the concept itself, would be a positive gain. It would seem the part of wisdom to seize this opportunity to eliminate a word of ambiguous meaning from a vocabulary long overburdened with ambiguity.

What effect would the adoption by jurists of this new concept in place of the Austinian theory of sovereignty have upon legal thinking? It would, I think, result in a real gain. In deciding cases the courts, for the most part, manage to get along very well without the aid of the Austinian theory of sovereignty. The new theory recognizes the necessity of rules and of organizations to maintain those rules; it recognizes, therefore, the theory of courts as it is known to-day. That is to say, it admits the necessity of a system of courts—an organization whose primary function is to settle disputes

¹ *Op. cit.* *supra* p. 230, note 1 at 239.

—and the principle that the rules of that system shall prevail over the rules laid down by an individual for the guidance of his own conduct, or shall prevail over the rules of other organizations in the community. The limitation that the rules shall not so prevail in cases of last instance is no limitation at all. If such a case arises, and a rule is asserted which is contrary to the rule of the system, the way is open to change the latter rule by orderly processes; if the orderly process is unavailing the proponents of the new rule, if they desire it earnestly enough and possess sufficient power, will change it by force. This is merely the assertion of a political fact which all systems must recognize. But the adoption of the new theory as a substitute for the Austinian theory will result in one positive change in the method of deciding cases. It will deprive the courts of an obsolete prop on which to rest some decisions. The cases in which the Austinian theory is utilized as a basis for decision are infrequent, but the complete elimination of the doctrine from the realm of judicial thought would be an advantage. One example will suffice. It is a well settled principle of Anglo-American law that the state cannot be sued without its consent. This immunity to-day is based by the English courts on the maxim "The King can do no wrong" and on his inability to issue a writ to himself.¹ The immunity of the sovereign which, during the feudal period, was a purely personal one, was transferred to the democratic state after the collapse of the feudal system. The doctrine in time became an accepted fact of jurisprudence and its justification by the American courts became merely a matter of the citation of ancient authorities. In *Kanawauakoa v.*

¹ *Watkins, The State as a Party Litigant* (1927), *passim* and 192 et seq.

Polybland,¹ Justice Holmes, however, attempted to justify the doctrine on logical grounds :

Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its own permission, but the answer has been public property ever since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy."

Justice Holmes here rests the theoretical justification of the doctrine of state immunity from suit squarely on the Austinian concept of law and sovereignty. But, of course, the Austinian concept is not a justification of the doctrine, since the thesis which Holmes wishes to establish is itself explicitly stated in his premise; the sovereign, by Austin's definition, is not subject to his own laws. If Holmes² had here followed his own conception of law—that law is what the courts do in fact—he would have been unable to discover a justification of this doctrine on logical grounds other than the fact that the courts do apply it. "It is only if the state is considered as something apart from, superior to, those who compose it", as Watkins³ says, "that *ex necessitate* it will not be bound by its own rules." But the abandonment of the Austinian theory and the substitution of the new theory, although it will make unavailable for judicial reasoning one argument occasionally relied upon, need not, and perhaps may not, affect the practical result, however desirable it may be in certain circumstances. Judges will still be free to reach the same

¹ 205 U. S., 349, 353 (1907).

² *Collected Legal Papers* (1920), 172

³ *Op. cit. supra* p. 234, note 1 at 198.

conclusions which they have imagined heretofore that the application of the Austinian theory required. It is important to remember, moreover, that the doctrine of sovereignty was a gift of political theory to law, and it seems appropriate to say that what the political theorist giveth, the political theorist taketh away; and in this instance I think the wonted blessing should be added.¹

When we turn to the question of the relation between the state and law, we encounter a controversy which has been waged by political theorists for many centuries.² Is the state subject to law? Does law derive its authority from the state? These are questions which political theorists have been asking themselves since the days of the Sophists; no answer ever proposed has won general acceptance and, as Borchard³ concludes after a thorough historical survey, the problem would seem to be insoluble.

The analytical conception of law as the command of the sovereign, and the definition of sovereignty as legal omnicompetence, which is ascribed to the state, requires the analytical jurist to view the state as the sole source of law and as not itself subject to law.⁴ But this view, as was to be expected, has been found unsatisfactory by those to whom the Austinian theory of sovereignty is anathema. The leaders of the attack

¹ Cf. op. cit. supra p. 230, note 1 at 239. Nothing has been said here of the effect upon the doctrines of international law of the abandonment of the theory of sovereignty. The foundations of international law are being so thoroughly revised at the present time that I have felt that it would be premature to discuss the question. Cf. Dunn, *The Protection of Nationals* (1932), passim. On the relation of the idea of sovereignty to theories of international law, see, however, Coker, op. cit. supra p. 222, note 1 at 98; Borchard, *Political Theory and International Law* in 4 Dunning, *A History of Political Theories* (1924), ed. Merriam and Barnes, 125 et seq.; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 43 et seq.

² For histories of the question see Borchard, *Government Responsibility* in Tort, VI (1927), 36 *Yale L. J.*, 1039; Sander, *Staat und Recht* (1922).

³ Op. cit. supra note 2 at 1096.

⁴ Op. cit. supra p. 226, note 1 at 129.

upon the analytical theory of the relation of law and the state are Duguit, Krabbe and Laski. For Duguit,¹ the state and law are independent phenomena. The state has no connection with law, and political commands derive their authority merely from persuasion or from the penalties which the men in control of the state are able to impose. Laws, however, are the rules of conduct which must be obeyed for the preservation of society; their sanction is not organized coercion, but is the psychological approval accorded rules which promote social ends and preserve the benefits conferred by society. Duguit therefore concludes that law is completely independent of the state, and is superior and anterior to political organization. Furthermore, law is objective and not subjective; its validity depends upon the end it serves and not upon its source. Since those who act in the name of both the state and the people are subject to law, the state itself is necessarily subject to law. Krabbe² likewise holds that law is superior to and, in origin, independent of the state. He regards Duguit's theory that the state is only a fact unrelated to law, however, as untenable. The idea of the state, he insists, must be derived from the law, and the authority of the state is nothing but the authority of law. Law itself is not determined objectively, but subjectively, and includes all rules which spring from men's feeling or sense of right. Laski,³ who defines law as the "operative satisfaction of effective demand", denies that the state is its ultimate source and insists that its sources are

¹ *L'État, le droit objectif et la loi positive* (1901), *Traté de droit constitutionnel* (2d ed., 1925), *L'État, les gouvernants et les agents* (1905).

² *The Modern Idea of the State* (1922). For an acute criticism of Krabbe's general theory see Cohen, *Law and the Social Order* (1953), 312.

³ Op. cit. supra p. 230, note 1 at 273; op. cit. supra p. 226, note 2 at 55, 275, 395.

as varied as life itself. The state, he holds, is the organ through which the fact that some particular demand has secured a factual title to satisfaction is registered. "It is an announcement that behind this given demand there lies, prospectively, the coercive power of society . . . the state is no more than the form such registration now assumes." He holds that as a simple matter of obvious justice the state should be subject to law, that is, the state should be liable to suit in the same way that a private person is liable.

Thus it would appear that the answer to the question of the relation of state and law depends, in theory, upon the definition of the two words, or upon the particular ethical principle invoked. If, with Aristotle,¹ we define the state as the collective body of citizens and hold that law has no power to command obedience except that of habit, we will arrive at a different answer to our question than if we accept Austin's theory of law and sovereignty. Like so many controversies, this particular one has resolved itself into differences about the meaning of words.² Each political theorist, in Wittgenstein's³ phraseology, has made himself a picture of facts, and the truth or falsity of each picture consists in its agreement or disagreement with reality. "In order to discover whether the picture is true or false", as Wittgenstein declares, "we must compare it with reality. It cannot be discovered from the picture alone whether it is true or false. There is no picture which is *a priori* true." We should, in other words, first ascertain whether or not

¹ *Politics*, III, 1, § 2. Ibid., II, 8, § 24.

² "Scientific controversies constantly resolve themselves into differences about the meaning of words," Professor Schuster has declared. Quoted, Ogden and Richards, *The Meaning of Meaning* (1923), Chapter XXXII.

³ *Tractatus Logico-Philosophicus* (1922), 2 1 et seq.

the state is, in fact, subject to law ; and whatever may be our answer we should then determine whether or not as a matter of ethics it ought to be. We should, that is, answer the question upon the basis of facts, and with the guidance of ethics, and not attempt solutions by analysing the meaning of words. As a question of fact, it requires no lengthy analysis to show that the state, acting through the government, both is, and is not, subject to law. As a practical matter, every authority in the state, every person to whom power is entrusted, is subject to law, if we are to give the word " law " any meaning at all. The state, for one example, can only take the life of a citizen according to the prescribed rules ; and when the state sometimes ventures to ignore those rules, as in the case of Sacco and Vanzetti, the men speaking in its name quickly realize, through the reaction of the community, the dangers which attend such behaviour. On the other hand, because of a mystical legal and political conception of absolute sovereignty, the doctrine has developed that the government is not responsible in tort. This brings us to the consideration of ethics. Ought the government to be superior to law ? To ask the question, it is submitted, is to answer it. The ordinary citizen is entitled to be protected from wrong, irrespective of the source from which it may emanate. The men who act in the name of the state should be required to answer for the consequences of their conduct as private citizens are so required. To allow government officials to shield themselves behind an obsolete and untenable theory of the nature of the state is to violate the first principles of right conduct.

With respect to the subsidiary question—Does law derive its authority from the state ?—little comment is

required. It is to-day the general opinion that the sources of law, as Professor Laski is above quoted as saying, are as varied as life itself. Only for the purposes of formal reference can it be maintained that the state is the source of law ; and this is a purpose which can never satisfy, as Professor Laski says, those over whom its sanctions operate.

(b) The Separation of Powers

It is necessary, Aristotle¹ observed, when we inquire into a subject, to separate the different parts of which it is compounded. Following this principle, he² noted that a government, in its first grand division, was formed of three parts : the public assembly, the officers of the state, and the judiciary. Thus was born the now fundamental doctrine of American jurisprudence that no branch of the government—legislative, executive or judicial—except so far as the constitution permits, or efficient administration requires, shall exercise any of the essential functions or powers of any other branch. We need not inquire whether Aristotle by his classification intended to describe merely a characteristic which the governments he had studied had exhibited, or whether he meant to assert a basic classification, inherent in the nature of government, which all governments should exhibit ; as all good Diptera have two wings.

We may also pass over, in order to confine the discussion within reasonable bounds, the interesting history of the idea in the hands of political theorists prior to Locke and Montesquieu. It is with these two names that historical discussion of the doctrine of the separation of

¹ *Politics* I, 1.

² *Ibid.*, iv., 14-16

powers is most concerned. Locke¹ held that there were three natural powers in every government, which he termed the legislative, executive, and federative. The legislative and the executive powers should always be kept separate, he believed, as it was too great a temptation to human frailty for the same persons who have the power of making laws to have also in their hands the power to execute them; such persons might exempt themselves from obedience to the laws they made, and suit the law, both in its making and execution, to their own private advantage. The federative power he defined as the power of making war and peace, and treaties. The executive and federative powers, he held, though they are really distinct in themselves, are normally joined together and are not easily separated. These ideas were adopted by Montesquieu,² and in his hands they received their classic treatment. There are in every state, he said, three powers, and he held flatly that the separation of the different powers was essential to civil liberty. "When the legislative and executive powers", he writes, "are united in the same person or body, there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. There is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with the violence of an oppressor. There would be an end of everything if one man or one

¹ *Two Treatises of Civil Government* (Morley's ed., 1884), Book II, Chapter XII.

² *Spirit of Laws*, Book VI, Chapter VI.

body, whether of princes, nobles or people, exercised these three powers : that of making the laws, of executing public resolutions, and of judging the case of individuals." In these sentences Montesquieu embodied a page of future history.

It is customary for those who write of Montesquieu in this connection to make sport of the fact that although Montesquieu purported to be describing the English constitution, no such separation of powers existed in fact in the British Government. The judicial and executive officers, it is pointed out, were, and still are, in form, agents of the Crown and legally subordinate to Parliament; and the chief active executives were, and are, practically a Parliamentary committee. But, it may be pointed out, this mistake, if it is properly so characterized, was committed also by Blackstone.¹ More basically, the criticism is, however, a mere detail. Montesquieu was intent upon promoting the liberty of the people. He saw through the bewildering complexities of governmental institutions, boards and offices to their essential functions and he saw that in the main those functions could be grouped under three principal heads. He was not concerned with details, with whether or not his description was factually accurate in all its particulars; he was interested only in the essential characteristics. In its broad outlines his picture at the time was true; and as a picture of what has transpired since he wrote, it has become a faithful portrayal even of details.

In England, until recently, Montesquieu's doctrine attracted little attention from political writers,² but in

¹ 1 *Bl. Comm.*, *269.

² Cf. however Paley, *Moral and Political Philosophy* (1860), Book VI, Chapter VIII, 235; Mill, *Representative Government* (1861), 242; Sidgwick, *Elements of Politics* (1897), 333.

America it was seized upon at an early stage and given practical application. In Virginia, where in 1776 the first constitution was adopted, the judges, under the colonial system, had sat in the legislature; in the Bill of Rights, however, of the 1776 constitution, it was expressly provided "that the legislative and executive powers of the state should be separate and distinct from the judiciary."¹ The Maryland Declaration of Rights, also framed in 1776, contained the unqualified injunction "That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other."² The Massachusetts Declaration of Rights,³ adopted in 1780, is even more explicit: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." All the first constitutions in fact provided for three departments and, except in a few states,⁴ the American state constitutions to-day contain a provision for the separation of powers.

No specific distributing clause, however, was written into the Federal Constitution; but it is argued that if the first three sentences of the first three articles—which provide that "all legislative powers herein granted shall be vested in a Congress of the United States", that "the

¹ 7 Thorpe, *The Federal and State Constitutions* (1909), 3813, § 5.

² 3 *ibid.*, 1687, § VI.

³ 3 *ibid.*, 1893, § XXX.

⁴ The exceptions are Kansas, North Dakota, Ohio, Pennsylvania, Washington and Wisconsin.

executive power shall be vested in a President of the United States of America", and that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish"—are read together, its equivalent is found, and that therefore the doctrine of the separation of powers is part of the Federal Constitutional jurisprudence. At the Federal Convention, Montesquieu's writings were accepted as political gospel. There can be little question that when Madison¹ remarked to the delegates that one of the principal objects of the new government would be to provide "more effectually for the security of private rights, and the steady dispensation of justice", that he was referring to the usurpation of power by state legislatures. "It is against the enterprising ambition of this department", he was to write later in *The Federalist*,² in answer to the objection that the Constitution violated the doctrine of the separation of powers, "that the people ought to indulge all their jealousy and exhaust all their precautions." Notwithstanding the explicit injunctions of the state constitutions, the legislatures had encroached upon the powers of the executive and the judiciary with resulting abuses which were everywhere recognized. "If we look into the constitutions of the several states", wrote Madison,³ "we find that, notwithstanding the emphatical and in some instances the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . . The

¹ 1 Farrand, *Records of the Federal Convention* (1911), 134 Cf. 1 *ibid.*, 34, 86, 2 *ibid.*, 77.

² No. 47.

³ *The Federalist*. Nos. 46-7.

conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands." If an injunction written into a constitution would not operate to keep the departments separate, by what method could this object be attained? Practically, the Federal Constitution embodied the doctrine of the separation of powers. But, as Professor Carpenter¹ has observed, "the Federal Convention adjourned without knowing how the partition of power among the several departments was to be maintained." Hamilton,² several weeks later, gave the answer when he asserted that it was the duty of the judiciary "to declare all acts contrary to the manifest tenor of the Constitution void." The judiciary was to be the safeguard which would keep the departments within the spheres assigned to them by the Constitution. "It is far more rational",³ he wrote, "to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. . . . A constitution is, in fact, and must be regarded by the judges, as a fundamental law." With *Marbury v. Madison*,⁴ Hamilton's argument became the settled doctrine of American jurisprudence.

In France, as was to be expected, Montesquieu's doctrine of the separation of powers had a large influence.

¹ The Separation of Powers in the Eighteenth Century (1928), 22 *Amer. Pol. Sci. Rev.*, 32, 43.

² *The Federalist*. No. 78.

³ *Ibid*

⁴ 1 Cranch, 137 (1803).

But it was not immediately accepted. The Physiocrats, indeed, were founded to demonstrate that their economic system was contrary to Montesquieu's political system¹ and the first of Quesnay's² general maxims read: "That the sovereign authority be unique and superior to all individual members of the community and to all unfair enterprises of private interest, for the purpose of authority and of obedience is the protection of all and the legitimate interests of all. The idea of a system of checks and balances in a government is unfortunate and reveals only discord among the great and the crushing of the weak." But by 1791 Montesquieu's doctrine had triumphed; it became the glad tidings of the Revolution. The Declaration of the Rights of Man³ declared that "Every society in which . . . the separation of powers is not determined has no constitution." In the unsuccessful constitution of 1793, the doctrine was, however, ignored; but in those of 1791, 1795 and 1848 the familiar maxim is reaffirmed. "The separation of powers is the first condition of a free government", declares the constitution of 1848.⁴

Before considering the application of this political doctrine by the courts in deciding cases, it will perhaps be useful to summarize briefly the opinions of contemporary political theorists on the validity of the doctrine to-day. In America, Professor Goodnow⁵ was one of the earliest of prominent political theorists to attack the doctrine. He insisted that it was incapable of accurate

¹ Roustan, *The Pioneers of the French Revolution* (1926), 62.

² *Oeuvres économiques et philosophiques de F. Quesnay* (1888), 329.

³ Art., 16.

⁴ Art., 19.

⁵ *Comparative Administrative Law* (1893), 20, cf. *Idem., Politics and Administration* (1900), 9.

statement and that it was impossible to apply it with beneficial results in the formation of a concrete political organization. Until recently, the general attitude of American political scientists¹ was, in fact, one of opposition to the theory upon the common ground that it was a historical inaccuracy and unworkable in practice; but Professor Green,² in 1920, undertook to answer the criticisms upon the basis that it has shown itself to be capable of consistent application, and that it insures to the holders of authority a position of relative impartiality, which lessens the likelihood and apprehension of unfairness, while it has been proved to possess elasticity enough to permit the conferring of fairly sweeping and summary powers where needed. But Mr Lincoln Steffens,³ from a wealth of practical experience has recently offered his testimony that the theory did not work in practice and that constitutions and charters do not affect essentially the actual government. Early in his career he found this out and, he declares, "I never myself thereafter read the charter of any city or state that I studied. The paper government did not count." In England, Professor Laski,⁴ in one of his first books, used almost the identical words in condemning the theory, which, he held, possesses in fact only "a paper merit for the simple reason that in practice it is largely unworkable." To this, Mr Cole,⁵ speaking for the guild socialists, and appraising the principle as a safeguard

¹ Ford, *Rise and Growth of American Politics* (1898), 68; Wilson, *Congressional Government* (1885), 284; Powell, *The Separation of Powers* (1912), 27 *Pol. Sci. Quar.*, 215; Holcombe, *State Government in the United States* (2nd ed., 1926), 49.

² *Separation of Governmental Powers* (1920), 29 *Yale L. J.*, 369. Cf. Fairlie, *Separation of Powers* (1923), 21 *Misb. L. Rev.*, 393.

³ *Autobiography* (1931), 409.

⁴ *Authority in the Modern State* (1919), 71.

⁵ *Social Theory* (1920), 125.

against tyranny, added : " Whatever value this principle may have had in the past, it has little or none to-day." But in his most considered work, which is at the same time one of the great political treatises of the twentieth century, Professor Laski finds the doctrine important for the modern state. " Some distinction between the three powers",¹ he urges, " is essential to the maintenance of freedom." But more recently Professor Finer² has attempted to show that a triad of powers is impossible, that in reality all government is a single process, and that the division of government into parts with relative power depends upon various factors. In France the doctrine has been subjected to a heavy attack, particularly by Duguit,³ who denies in the first place that the state has any powers at all. Berthelemy⁴ holds that the constitutional laws of 1875, following a tradition inaugurated in France in 1789, have confided to two distinct authorities the two essential functions of the political organism : the making of the laws and the execution of the laws. " Should the judiciary constitute a third power ? " he thinks is only an academic question, which he answers in the negative, since if we found that it did, it would not thereby achieve, in practice, any greater independence of legislative or executive power. Theoretically justice is essentially independent ; practically, its independence is guaranteed now by one method, now by another. As a matter of good logic, he holds, there is no middle ground between making the laws and executing them. Esmein,⁵ however, argues

¹ Op. cit. *supra* p. 226, note 2 at 296.

² *The Theory and Practice of Modern Government* (1932), 153.

³ *Traité de droit constitutionnel* (2nd ed., 1923), 514

⁴ *Traité élémentaire de droit administratif* (5th ed., 1908), 10.

⁵ *Éléments de droit constitutionnel* (1896), 318

strongly for the recognition of the judicial power, both upon historical and theoretical grounds. Historically, the rendering of justice to each has been the first need of human society ; the judicial power is the most ancient of all the powers. Theoretically, it is not true to say that in the government it is only possible to distinguish two acts and two powers : the formation of law and the legislative power, its execution and the executive power. The judicial function is a distinct function, and not an incident of the executive function ; to hold otherwise would lead logically to situations which cannot be admitted. He concludes, however, with the reservation that if the principle of the separation of powers is a great truth, it is nevertheless not an absolute truth ; for, as the executive power is controlled by the legislative power, so the judicial power will be supervised and controlled by the executive power. With this view Artur¹ agrees in principle. Hauriou² also recognizes the judiciary as a separate power, although in addition to the power of the judiciary, he recognizes three other powers, three organs and three functions. In Germany, there is much the same story to tell. Hegel³ regarded the division of the functions of the state as the guarantee of public freedom, but Bluntschli⁴ held that a "complete separation or sundering of powers would be a dissolution of the unity of the state." He stated, however, that the phrase "separation of powers" embodied a true principle. He divided the power of the modern state into five

¹ *De la Séparation des pouvoirs et de la séparation des fonctions* (1905), 33, 39.

² *Principes de droit public* (2nd ed., 1916), Part IV, Chapter IV. For a full exposition of Hauriou's views see Gooch, *French Views on the Separation of Powers* (1923), 38 *Pol. Sci. Quar.*, 378, 390.

³ *Philosophy of Right* (1896), 275.

⁴ *Theory of the State* (3rd ed., 1895), 518.

groups, with the legislative power superior to all others. But Jellinek¹ rejected Montesquieu's theory on logical and practical grounds and declared that from the point of view of the recognition of the nature of the state, the question, however important for history and politics, does not exist; and more recently Laband² has stated that the principle is everywhere rejected in Germany. Ehrlich,³ however, has repudiated the criticism of German scholars and holds that Montesquieu's theory embodies a great truth; and in the German Constitution of 1919 there is at least a nominal preservation of the principle. In short, one can find eminently respectable authority, among the political scientists and writers on jurisprudence, for almost any view of the doctrine of the separation of powers for which one has a predilection. It is a doctrine to which the efforts of political theorists, in an attempt to reach some general agreement and to give the doctrine a definitive statement, could well be devoted with profit.

But the important aspect of the problem from the legal standpoint is whether the doctrine possesses meaning for the courts. That it is no longer an accepted canon among political scientists has begun to be recognized by the courts⁴ chiefly upon the authority of Professor Goodnow, and a statement to this effect has

¹ *Allgemeine Staatslehre* (3rd ed., 1914), 497.

² *Das Staatsrecht des Deutschen Reiches* (4th ed., 1901), 6 note 2. This statement is withdrawn, however, in later editions. Cf. 2 *ibid.* (5th ed., 1911), § 54. Cf. v. Mohl, *1 Geschichte und Literatur der Staatswissenschaften* (1855), 280; Stein, *1 Handbuch der Verwaltungslehre* (1887), 18; Meyer, *Lehrbuch des deutschen Strafrechts* (6th ed., 1907), 28, 135; Carré de Malberg, *2 Théorie générale de l'état* (1922), 14.

³ Montesquieu and Sociological Jurisprudence (1916), 29 *Harv. L. Rev.*, 582.

⁴ *Zanesville Tel., etc., Co. v. Zanesville*, 10 Oh. S. and C. P. 134, 8 Oh. N. P. 73 (1900), *Claudio v. Ortiz*, 29 Porto Rico 404 (1921), *State v. Johnson*, 75 Mon. 240, 243 Pac., 1075 (1926).

crept into one of the standard encyclopædias of law.¹ It will, however, assist in confining the present inquiry within due limits if we restrict the question to the attitude of the Supreme Court and omit discussion of the diverse expression of state courts.

As early as 1825 the Supreme Court, in a careful opinion by Marshall, considered the limits of Montesquieu's doctrine and formulated it in the most cautious terms :

It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts ; yet it is not alleged that the power may not be conferred on the judicial department. . . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law ; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.²

In brief, the court refused to draw abstract lines of separation between departments, which would have the force of rules of law ; it preferred to allow governmental activity to function with as much freedom as possible rather than to restrict and cramp it in its developing

¹ 12 C. J., art. Constitutional Law, § 235 (1917).

² *Wayman v. Southard*, 10 Wheat. 1, 42, 46 (1825)

stage. Thus, it was held that an act of the Connecticut legislature granting a new trial after the expiration of time to appeal was valid¹; that remedial acts are not liable to the imputation of being assumptions of judicial power²; that the granting of a right to trial by jury in cases of proceedings for contempt in violations of injunctions by acts which are also criminal is not unconstitutional, as interfering with the inherent power of courts to punish for contempt³; and that no usurpation of the pardoning power of the executive is involved in the action of a court, at the term in which sentence was imposed, in reducing the punishment after the prisoner has served a part of the imprisonment originally imposed.⁴ In *Kilbourn v. Thompson*,⁵ however, it was held that the House of Representatives, in passing a resolution reciting that the United States was a creditor of Jay Cooke & Co., and appointing a committee to inquire into the nature and history of the real estate pool, not only exceeded its own authority, but assumed a power belonging to the judicial department; and in a few instances⁶ the court has rejected acts the effect of which was to limit the exercise of the judicial judgment through the imposition of an arbitrary mandate. In a number of cases the court specifically rejected an abstract application of the doctrine in favour of the practical demands

¹ *Caldier v. Bull*, 3 Dall., 386 (1798), Cf. *Stephens v. Cherokee Nation*, 174 U. S., 445 (1899), Cooley, *Constitutional Limitations* (7th ed., 1903), 137

² *Freshorn v. Smith*, 2 Wall., 160 (1865).

³ *Mitchelson v. United States*, 266 U. S., 42 (1924).

⁴ *United States v. Bantz*, 282 U. S., 304 (1931). Cf. *Ex parte Grossman*, 267 U. S., 87 (1925).

⁵ 103 U. S., 168 (1881).

⁶ *United States v. Klein*, 13 Wall., 128 (1871), *McFarland v. American Sugar Co.*, 241 U. S., 79 (1916). Cf. *Mobile, J. & K. C. R. Co. v. Turnpseed*, 219 U. S., 35 (1910), *Hayburn's Case*, 2 Dall., 409 (1792).

of government.¹ The general attitude of the court in the emphasis it placed upon practical requirements was well summed up by Chief Justice Taft in his eulogy of Chief Justice White.²

The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and judicial machinery of the Federal government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen.

Indeed, the fact that the Supreme Court had never held any Act of Congress unconstitutional as contrary to the doctrine of the separation of powers on any philosophic or historic interpretation of that principle, led Professors Frankfurter and Landis³ in 1924 to express the hope that we are dealing with what Sir Henry Maine⁴ termed a "political doctrine" and not a technical rule of law. This hope remained legitimate for two years. But on October 25th, 1926, Chief Justice Taft delivered the opinion for the majority of the court in *Myers v. United States*⁵ and the view which the court had

¹ *Cary v. Curtis*, 3 How., 236 (1845) (Dissenting opinion by Story, J.); *The Sinking Fund Cases*, 99 U. S., 700 (1878) (Dissenting opinion by Field, J.); *Interstate Commerce Comm. v. Brimson*, 155 U. S., 3 (1894). Cf. Frankfurter and Landis, Power of Congress over Procedure in Criminal Attempts in "Inferior" Federal Courts (1924), 37 *Harv. L. Rev.*, 1010, 1015, note 23.

² 257 U. S., XXV-VI.

³ Op. cit. supra note 1 at 1014.

⁴ *Popular Government* (5th ed., 1897), 219.

⁵ 272 U. S., 52 (1926).

consistently rejected in the hundred and thirty-seven years of its existence became the established rule. With that opinion the doctrine of the separation of powers ceased to be a "political maxim" and became a full-fledged rule of law. A majority of the court declared invalid an Act of Congress which had been on the statute books for more than fifty years and which provided that "Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." The Chief Justice urged, as one of the grounds of invalidity, the fact that the Act violated Montesquieu's principle, a principle, he held, which had the "full approval" of the Constitutional Convention. From this principle he deduced the rule of construction that "the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively required." All this may be granted; but the Chief Justice still had to prove that the power of removal was inherent in the executive. This he attempted to do upon the grounds of necessity and of history. The first ground he stated as follows:

Mr Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for constructing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the Article to "take care that the laws be faithfully executed". Madison, 1 *Annals of Congress*, 496, 497.

To which Justice Holmes, in his dissenting opinion, replied that the argument seemed to him a spider's web

"inadequate to control the dominant facts". Years before, as Justices McReynolds and Brandeis pointed out in their dissenting opinions, the same argument had been answered fully by Calhoun¹ :

Congress shall have power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the government or any department or officer thereof; and of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended for by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power, and necessary to carry it into effect, transfers it, by the provisions of the Constitution cited, from the executive to Congress, and places it under the control of Congress, to be regulated in the manner which it may judge best.

With respect to the historical ground, the Chief Justice said :

It is quite true that in state and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts, but such a disposition of it was really vesting part of the executive power in another branch of the government. In the British system, the Crown which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words "executive power" as including both. *Ex parte Grossman*, 267 U. S., 87, 110. Unlike the power of conquest of the British Crown, considered and rejected as a precedent for us in *Fleming v. Page*, 9 How., 603, 618, the association of removal with appointment of executive officers is not incompatible with our republican form of government.

But, as Professor Corwin² has shown, the argument proves too much. The British Crown not only possesses,

¹ *Register of Debates in Congress*, 23rd Cong., 2nd Sess. (1835), 553.

² *Tenure of Office and the Removal Power under the Constitution* (1927), 27 *Cal. L. Rev.*, 353, 383.

as the product of a long historical process, power of appointment and removal, but also power to create offices, the only limitation being that the King shall not create offices with fees attached, as this would be equivalent to laying a tax, which is within the exclusive power of Parliament. The rule in the United States is, of course, exactly the opposite. Under the Constitution, the only offices are those "which shall be established by law". "Any comparison, between 'executive power' as known to the Constitution of the United States and the prerogative of the British Monarch, as regards the power of removal, is consequently not only valueless to the Chief Justice's argument, it is positively detrimental", concludes Professor Corwin, "in that it draws attention to the fact that the Constitution itself assigns the germinal element of prerogative in connection with offices, to wit, their creation, to Congress."

The court, having sampled the doctrine, found it pleasant. Two years later in *Springer v. Philippine Islands*,¹ the principle of the Myers case was reaffirmed. In this case an act of the Philippine legislature provided, in the case of a government-owned corporation, that "the voting power of all such stock owned by the government of the Philippine Islands shall be vested exclusively in a committee, consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives." The court held the elections of directors and managing agents by a vote of the government-owned stock were essentially executive acts which the legislature was without capacity to perform directly or through any of its members. Justice Sutherland, in holding that the act violated the rule with

¹ 277 U. S., 189 (1928).

respect to the separation of power, pointed out that "it is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court" in the Myers case.

Justice Holmes, however, refused, in a notable dissent, to concur. In the following paragraphs, extracted from his dissent, he sums up what had certainly been the attitude of the court towards the problem until the Myers case, and it was hoped generally that even that case did not preclude the view he here urged.

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on. . . . Parallel to the case before us Congress long ago established the Smithsonian Institution to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

To these words there is little to add. Since the Myers and Springer cases, a political maxim has taken on the force of a rule of law, and a doctrine which has hitherto been interpreted from the standpoint of practical government is analysed now from the position of theoretical lines of separation and "inherent powers". As the arguments of the political scientists have shown us, the question of the nature of the doctrine is a glorious

field for dialectical debate and fine-spun arguments ; but as the wisdom of Marshall has also made clear, such discussions should be, if possible, avoided by the courts.

(c) The Theory of Rights

Political theory's contribution to the problem of rights requires only a brief discussion. As a term of art in legal thinking the word "right" has acquired a variety of meanings. It has been the task of the writers on jurisprudence to distinguish sharply the meanings associated with the word, and, so far as possible, agree upon the smallest number consistent with clear thinking and usage. To-day there is perhaps a general tendency, at least in American jurisprudence, to define a right as a legally enforceable claim, a conception which received a thorough analysis at the hands of the late Professor Hohfeld.² But the legal scholar is primarily concerned with the conception of a right within the legal system. He is not first interested in whether the claims which the courts will enforce are ethically justifiable or whether there may not be other claims which the courts should, but do not, recognize. It is at this point that political theory offers its contribution. The political theorist attempts to tell us whether the rights which the law recognizes are the rights which ought to be recognized and whether it has not neglected some which need recognition. It endeavours to supply a standard by which the propriety and the adequacy of a system of

² *Fundamental Legal Conceptions* (1923); cf. Corbin, *Rights and Duties* (1924), 33 *Yale L. J.*, 501; Randall, *Hohfeld on Jurisprudence* (1925), 41 *L. Quar. Rev.*, 86; Kocourek, *The Hohfeld System of Fundamental Legal Concepts* (1920), 15 *Ill. L. Rev.*, 24; *Restatement of the Law of Property* (1929), Tentative Draft No. 1, § 1. For other theories of a "right", see Pound, *Legal Rights* (1913), 26 *Int. Jr. of Ethics*, 92; Wigmore, 2 *Select Cases on the Law of Torts*, Summary of Principles (1912), § 4, et seq.

legal rights can be judged ; it attempts to supply an ideal which the law must strive to attain if it is to satisfy the best interests of the community.¹

That this approach of political theory to the problem of rights is of value to the law needs no argument. It has been explicitly recognized from time to time in juristic writings, and under the stimulus from this source the courts have given effect to hitherto unrecognized rights. A notable example from the law is the article contributed by Justice Brandeis (when at the Bar) and Professor Warren² to the *Harvard Law Review* on the right to privacy, in which it was urged that the courts should recognize a new right—the right of the individual to be protected in his personal affairs from unauthorized publicity. In a number of jurisdictions—California, Kansas, Kentucky, Missouri, New Jersey and New York—either by court decision or by statute, such a claim is now enforceable. But the tendency of modern political thought is to go much further in the nature of the rights for which it is contending. It is urged, for example, that every citizen has the right to work and that he has the right to be paid an adequate wage for his labour. These are rights, however desirable, which are beyond the immediate power of the courts to enforce ; their existence depends upon legislation. The first implies a rigid supervision of industry and unemployment insurance ; the second, minimum wage legislation. But if we may judge by past experience, the constitutionality of such legislation will be determined by the economic and political opinions of the judges who pass

¹ For political discussions of the theory of rights see, e.g. Laski, *op. cit.* supra p. 226, note 2 at 89 ; Lord, *The Principles of Politics* (1926), Chapters VIII-X ; Gilchrist, *Principles of Political Science* (1921), 163.

² *The Right to Privacy* (1890), 4 *Harv. L. Rev.*, 193.

upon it, and not by the force of a rule of law. It is here that political theory through a thorough canvassing of the wisdom of such legislation, can have an immediate and beneficial effect upon legal thinking. The concern of legal scholars with the meaning of rights in a legal system is important and necessary; but a theory of rights, which neglects the ethical considerations contributed by political theory is not only incomplete but dangerous to the welfare of the legal system as a whole. It is a platitude to say that the legal system must, as a condition of its existence, perpetually adapt itself to the changing needs and ideals of the community in which it functions.

CONCLUSION

To sum up, political theory has always maintained an intimate connection with legal thought. Its development at any stage has been largely conditioned by the legal thought of the particular period: in turn, political theory itself has been an influential factor in the progress of the law and has exerted a direct effect upon legal thinking. It appears at the present day that the connection between the subjects of law and political theory lies principally in the idea of sovereignty and the notion of law, the doctrine of the separation of powers and the theory of rights. The concept of sovereignty, as we have seen, has undergone considerable revision in recent years and it appears desirable for the law to adopt the new concept in place of the old; similarly, the state, as a result of the modification of the doctrine of sovereignty, is no longer regarded as the sole source of law. In the case of the doctrine of the separation of powers, we have witnessed the gradual transformation by the Supreme

Court of a political maxim into a dubious rule of law. In connection with the theory of rights, the specific contribution of political theory lies in its insistence upon an ethical approach. Political theory, of all the social sciences, is the one, from the point of view of legal scholars, that is least suspect; it is the one to the pronouncements of whose practitioners the law has most readily lent an attentive ear. This perhaps is due to the fact that political thought has reflected so faithfully the conservatism of legal thought. But the modern tendency of political thought is to free itself from this dominance and it cannot be doubted that the resulting effect for both law and political theory will be a salutary one. By their independent approach to the same set of problems, each subject will provide a valuable check of the other's conclusions and should contribute materially to a final solution of their common problems.

CHAPTER VII

CONCLUSION

IN the foregoing pages we have examined, as precisely as may be, the possible contributions of five social sciences to the legal process. At this point it will be well to summarize the results of our investigation and to bring forward some general conclusions which have presented themselves in the several chapters.

Anthropology, we saw, has definite contributions to make to the concept of the nature of law, to legal history and to colonial jurisprudence. Economics is a field which seems to offer considerable material for the advancement of the juristic understanding of many social institutions and associations with which the law is directly concerned. In the chapter on the contributions of sociology we saw that jurists, at least since the early Greeks, in their attempts to correlate social facts or to display their relations, have been practising sociology. We saw further that sociology would seem to have four points of contact with the law : (1) analyses of the nature of law undertaken by sociologists ; (2) the " sociological method " as a tool in law making and legal analysis ; (3) sociological analyses of socio-legal institutions ; (4) the theory of cultural change as an aid in adjusting law to the changed material culture. It appears that the synthesis of law and psychology must develop by a cautious, critical analysis of one problem at a time ; in some departments of the law it is now prepared to

make contributions of such definiteness and value that the law can neglect them only at the risk of promoting injustice. Political theory, which has long maintained an intimate connection with jurisprudence, appears to-day to have three important contacts with the law : the idea of sovereignty and the notion of law, the doctrine of the separation of powers, and the theory of rights.

At this point a word may be allowed with respect to methodology. When we inquire what specific contributions a particular social science offers the worker in the legal field, we are confronted at the outset with the problem of locating the contributions. What method are we to employ which will lead us through the labyrinth of the social sciences to a point upon which we can place our finger and say : " This concept or this hypothesis may assist in legal development." It would seem obvious that there is no such mechanical method at present, or that one is not likely ever to be developed. In large part, each investigator will discover relations and formulate problems in this field from what, in the final analysis, is a purely personal outlook. There is no " scientific method " which the worker can apply mechanically towards the solution of the problem. The social sciences are not comparable to gears which need only to be placed in contact with a slight adjustment in order for the teeth to mesh ; their synthesis will be conditioned by the equipment, the sympathies and the prejudices of each investigator.

Nevertheless, as we have seen above, there are certain standards which are helpful. We ask ourselves first : What discoveries and conclusions of the social scientist are of value to the jurist ? We gain help here

from the fact that the social sciences have not yet become *a* social science. We are able to look separately, in a measure, at each social science; we are able, that is to say, to discern the fundamental elements—economic, psychologic, geographic, sociologic, etc.—of social science generally; we isolate these same elements from the legal process and with the assistance of logic at the one extreme and of imagination at the other, we manage to bring them together.

But the process of discovering relations is perhaps not so important as what occurs after the relations have been discovered. It has been urged in the previous chapters that the jurist must be a co-worker with the social scientist and the attempt has been made to show some of the positive gains which would result from such co-operation. It has been assumed that the present legal order contains many desirable features for social life as we know it to-day and that it also contains many undesirable features which we would do well to eliminate. But we must remember that there are at least two other ways of looking at the legal order and society in general. We can look at it, as Beard has said, ideologically. With Dr Pangloss we can say that this is the best of all possible worlds and the best of all possible orders. We are constrained to defend our established institutions against change and to discover relations which give them support. Examples are not far to seek. Westermarck, an immensely learned anthropologist—but with a prejudice in favour of monogamy—sought among the primates and the ruder cultures for evidence which could lead him to declare that monogamy had a natural basis. Similarly, other anthropologists, preferring the system whereby property is privately owned to that in which it

is communally possessed, have purported to find, on the basis of studies of primitive peoples, that private property, and perhaps even capitalism, has always existed. But the present order may be unsatisfactory to us and we may adopt the attitude customarily described as utopian. We may imagine a state of perfection—based either upon our conception of some earlier stage of society or upon some altogether imaginary order—towards which we should strive. That the legal ideologist may find the view here advocated too revolutionary, or that the legal utopian may find it too conservative, is beside the point. “The wise man”, as Havelock Ellis has said, “standing midway between both parties and sympathizing with each, knows that we are ever in the stage of transition. The present is in every age merely the shifting point at which past and future meet, and we can have no quarrel with either.” What is important in connection with the programme of co-operation with the social sciences which has been urged in the preceding chapters is that only one object is to-day legitimate—the ascertainment of the truth with respect to the subject investigated. In the social sciences the material which has accumulated is grist for the mills of both the ideologist and the utopian unless handled critically. No worse disaster could overtake the movement towards the unification of law and the social sciences than a selection of material from the social sciences for the sole purpose of defending or destroying our inherited legal institutions.

Montaigne affixed to one of the joists in his library, so that it would be constantly before him as he wrote, the adage: “I determine nothing; I do not comprehend things; I suspend judgment; I examine.” In the present stage of development of the social sciences it

well may be that there are many who are inclined to the view that this is a precept which the social scientist would be wise to heed. But it is important to remember in this connection that even if we do not find the considerable accomplishments of the social scientists, as compared with those of the natural scientists, altogether acceptable, that the social sciences, wholly apart from the immediate conclusions they may bring forward, are transforming our view of society and its institutions and associations. They are inaugurating a new era of inquiry. Like the Humanists of the seventeenth century, they are, in Lecky's words, "destroying the old prejudices, dispelling illusions, rearranging the various parts of our knowledge, and altering the whole scope and character of our sympathies." This effect is no less evident in the law than elsewhere. It may be, indeed, that the subtle transformation of the legal outlook which the social sciences are bringing about is the most significant contribution which they have to make to the law—far more important, the future may perhaps show us, than the positive contributions discussed in the preceding chapters. Nevertheless, if at present this is their chief contribution, the need for a methodized co-operation of law with the social sciences remains. Law itself, it must not be forgotten, is a social science, and if it is to achieve its full power, if it is to meet with success the incalculable risks and appalling surprises inevitably encountered in any attempt to order human society, it must join with the other social sciences in a united effort to solve the problems common to all.

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